Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

JOHN S. RENDALL, *Pro Se, Petitioner*
HERBERT M. CAMPBELL II, *Pro Se, Petitioner*

v.

THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION (SEC), *Respondents.*

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

FIRST
Has the United States Court of Appeals (10th Circuit) and the U.S. District Court violated a fundamental right of fairness when accepting and preparing "Amended Findings of Fact" (AFF) based on fabrication of evidence by the District Court?

SECOND.
Is it a miscarriage of justice for the Court of Appeals to accept tendered evidence by the District Court in its AFF, which was "clearly erroneous" as based on non-existent evidence of a video testimony? Fed. R. Civ. P. Rule 52 - Findings of Fact, … shall not be set aside unless clearly erroneous.

THIRD.
Is it a violation of a "Constitutional right of due process of law" for the Court of Appeals to affirm a District Court's AFF based on evidence not in the record? (The AFF was provided to the Court of Appeals pursuant to their order for evidence to support the original Findings of Fact of the District Court). The Constitution of the United States Amendment XIV.

FOURTH.
Does the absence of the record of all the exhibits (10 volumes numbered 500-1088) used in trial "void" the US Court of Appeals order and decision upholding the Amended Findings of Fact and Conclusions of Law of the lower court, which in turn, was prepared without the records of the exhibits?
Fed. R. App. P. 10(a) *See* United States v. Ross, 321 F.2d 61,65 No. 2 (2d Cir), *cert. denied*, 375 US 894 (1963)

II. PARTIES TO THE PROCEEDINGS

"Petitioners"

John S. Rendall, *Pro Se*
Herbert M. Campbell II, *Pro Se*

"Respondent"

The Securities and Exchange Commission

Solv-Ex Corporation

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IV. CITATIONS ENTERED IN THE CASE BY COURTS

A. Case 98 CV 00860
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B. Judgment - Defendants are permanently restrained and enjoined from violations of sections set out and that Rendall and Campbell pay civil penalties of $5,000 each to SEC dated **May 6, 2000.**

C. United States Court of Appeals for the Tenth Circuit, Case No. 00-2339, Order of Remand to District Court to clarify and identify evidence that filings with the SEC were false and misleading dated **August 4, 2003.**

D. In the United States District Court for the District of New Mexico - Amended Findings of Fact and Conclusions of Law dated **September 24, 2003**.

E. United States Court of Appeals for the Tenth Circuit, Case No. 00-2339, Order and Judgment affirming judgment of the District Court and denying Rendall's motion for the entire record of exhibits dated **April 15, 2004.**

F. United States Court of Appeals for the Tenth Circuit - Order denying petition for re-hearing and hearing en banc dated **June 16, 2004**.

V. STATEMENT OF JURISDICTION

A.
On April 15, 2004, the order and judgment of the United States Court of Appeals Tenth Circuit was filed in Case No. 00-2339 DC No. Civ-98-860-BB (D.N.M.) and is the subject of this Writ for review.

B.
On June 16, 2004 the order denying Appellant Rendall's petition for rehearing and rehearing *en banc* was filed in the United States Court of Appeals for the Tenth Circuit.

C.
The statutory provisions of the Rules of the Supreme Court of the United States, § 1253 and § 1254(1).

VI. STATUTORY PROVISIONS

A.

AMENDMENT XIV
(adopted 1868)

SECTION 1. All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

B.
Fed. R. Civ. P. Rule 1

Rule 1. Scope and Purpose of Rules

These rules govern the procedures in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1993, eff. Dec. 1, 1993).

1993 Amendments

The purpose of this revision, adding the words "and administered" to the second sentence, is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.

C.
Fed. R. Civ. P. Rule 52

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in

granting or refusing interlocutory injunctions, the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

I. STATEMENT OF THE CASE

A. Background

The Securities and Exchange Commission (SEC) brought this enforcement action against Defendants Solv-Ex Corporation, its CEO John Rendall, and its senior vice-president and general counsel, Herbert M. Campbell II, for alleged violations of § 7(a) of the Securities Act of 1933 (Securities Act), § 10(b) and § 13(a) of the Securities and Exchange Act of 1934 (Exchange Act), and the rules promulgated under those Acts. The SEC contended that from January 1995 through April 1997, Defendants issued a series of public statements in press releases, letters to shareholders, conference calls with investors and brokers, and filings with the SEC that created the misleading impression that each of the three technologies being developed by Solv-Ex was an unqualified success. The SEC asserted that "[t]he pattern of these statements created in the mind of any reasonable investor the expectation that commercial exploitation of the technologies, each with an attendant substantial revenue stream, was not only assured, but would occur in the very near future." R. Vol. IV, Doc 90 at 1.

After an eight-day trial to the bench, the district court issued a lengthy written decision finding that defendants Rendall

and Campbell had made material misrepresentations and/or omissions in public statements and in filings with the SEC. The court imposed first tier civil penalties of $5,000 against each of them and permanently enjoined both men from future violations of § 17(a), § 10(b) and § 13(a). Now proceeding *pro se*, Rendall and Campbell each appeal. Because the district court's decision does not contain key factual findings that are essential to effective appellate review, we must make a limited remand to the district to supplement its factual findings.[1]

B. Concise Statement Relevant to Questions

1. The court of appeals (10th Circuit) on review of the fully briefed appeal of John S. Rendall, *pro se*,[2] found:

> "Where the trial court provides only conclusory findings, unsupported by subsidiary findings or by an explication of the court's reasoning with respect to the relevant facts, a reviewing court simply is unable to determine whether or not those facts are clearly erroneous." Roberts v. Metro. Life Ins. Co., 808 F.2d 1387, 1390-91 (10th Cir. 1987) (quotation omitted).

Here, although the district court made lengthy findings of fact, there are some important gaps that preclude effective appellate review of most of the issues raised on appeal. Therefore, we must make a limited remand to the district

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[1] Exhibit A 1, pages 17, 18

[2] Exhibit A 1, page 23

court for further factual findings and explications of its reasoning, as we explain below.

2. The core issue to be addressed by the district court was bitumen extraction[3] and related to defendants representation of facts surrounding March 29, 1997 commencement of bitumen production,[4] stating:

> "If we compare these subsidiary findings to the defendants' relevant public statements of March 31, April 7 and April 30, 1997, we can determine which facts were omitted from those public statements. But we cannot determine which of the omitted facts the district court found to be material. Materiality is a 'fact-specific inquiry' that 'depends on the significance the reasonable investor would place on the withheld or misrepresented information." Basic Inc. v. Levinson, 485 U.S. 224, 240 (1988). Findings as to materiality are for the district court to make in the first instance."

3. The district court addressed the issue of "evidence" in its response to the 10th Circuit Court of Appeals (COA) on September 24, 2003. Exhibit A-2. The core issue of "bitumen extraction" findings of fact was now based on the non-existent video testimony of Dr. Jerry Fox.[5]

4. Defendant Rendall in his supplemental brief to the COA on October 20, 2003, Exhibit B-1, explained that

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[3] Exhibit A 1, page 19

[4] Exhibit A 1, pages 27, 28

[5] Exhibit A-2, paragraphs. 31, 34, 44, 48, 49, 50 , 54, 55, and 56

Dr. Jerry Fox's live testimony[6] concluded that the process works, Tr. 607,[7] and contradicts that filtration was part of the March 29, 1997 operation of bitumen extraction. Tr. 590.[8] There was no video testimony nor could there been as he (Dr. Fox) was a live witness.[9]

5. Rendall specifically drew the panel's attention to the question raised on the "core issue" of bitumen extraction in his supplementary brief on paragraphs 31, 34, 44, 48, and 50, pointing out that the evidentiary basis given by Judge Black was the non-existent video testimony of Dr. Jerry Fox.[10] It was deliberately fabricated evidence. In his Reply Brief, Exhibit B-2, Rendall reasserted that every finding is tainted in this fabrication of evidence (material error).[11] In light of these facts of fabrication of evidence, "the panel was deceived into accepting the biased District Judge's rulings."[12] The panel did not address the issue of "fabricated evidence" tainting the findings, nor the lack of specific response by the District Court to their August 4, 2003 order.[13]

6. Defendant Rendall requested that the entire record of exhibits be provided for the Court of Appeals[14] and

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[6] Exhibit B-1, page 114 ____
[7] Exhibit B-1, page 115
[8] Exhibit B-1, page 115
[9] Exhibit B-1, pages 113, 114
[10] Exhibit B-2, page 113
[11] Exhibit B-2, page 150
[12] Exhibit A-3, pages 88, 89
[13] Exhibit A-3, pages 88, 89
[14] Exhibit B-3, page 152

amended it to include certain specific exhibits.[15]

7. The Court of Appeals, by order dated April 15, 2004,[16] denied the request for the entire record of exhibits and allowed only specific exhibits.[17] The exhibits of the entire record are not in the possession of the Court of Appeals.

Subsequent Event

8. Defendant Rendall filed a Fed. R. Civ. P. Rule 60b(1)(2)(4)(6), and 28 U.S.C. § 144 motion in the District Court (DNM) in Civ. 98-00860 (BB) on August 19, 2004. However, in itself, this does not stay the finality of the Appeals Court (Tenth Circuit) decisions of April 15, 2004 and June 16, 2004.

C. JURISDICTIONAL STATEMENT

1. The SEC brought this action pursuant to authority conferred on it by Section 20(b) of the Securities Act [15 U.S.C. § 78u(e)] to restrain and enjoin the defendants from engaging in the acts, practices and courses of business described in this complaint and acts, practices and courses of business of similar purport and object. The SEC also sought relief in the form of an order requiring Defendants Rendall and Campbell to pay a civil penalty.

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[15] Exhibit B-4, page 155
[16] Exhibit A-3, page 86
[17] Exhibit A-3, page 90

2. The Court has jurisdiction in this action pursuant to Section 22(A) of the Securities Act [15 U.S.C. § 77v(a)], and Section 27 of the Exchange Act [15 U.S.C. § 78aa]. Certain of the acts, practices and courses of business constituting the violations of law alleged occurred, and all of the defendants reside, within the District of New Mexico.

3. This matter came before the Court of Appeals on the *pro se* motions for extension of time to file opening briefs, submitted separately by Appellant, John S. Rendall and Appellant Herbert M. Campbell II. The motions are granted as provided herein. Appellants' opening briefs were to be filed on or before March 1, 2001. No further extensions of this deadline may be granted on the clerk's authority.

4. Pursuant to 28 U.S.C. § 1291 (1988 and Supp. 1992) and Civil Docket for Civil No. 98-860 BB/RLP:

> "Final Judgment of Permanent Injunction and Other Relief" entered on May 16, 2000, which incorporated by the "Court's Findings of Fact and Conclusions of Law" entered on March 31, 2000,

which disposes of all claims by and against all parties as per Fed. R. Civ. P. 54(b). This final order of the District Court was appealed.

5. The order and judgment of the Court of Appeals was filed in the United States Court of Appeals Tenth Circuit on April 15, 2004, No. 00-2339.

6. Rendall's petition for a re-hearing and suggestion for a hearing *en banc* was denied on June 16,

2004 by the Tenth Circuit of Appeals.

VIII. ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI

A. The Rule of Law in the United States is based on evidence in the record. The primary finder of fact based on evidence in the District Court is the judge (or jury) (the trier of fact). The U.S. Supreme Court laid out explicitly what would be considered bias and prejudice by a judge as the "finder of fact."

> "The alleged bias and prejudice to be disqualifying must stem from an extra judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."

United States v. Grinnel Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 16 L.Ed 2d 778 (1966). This issue was dealt with in Re International Business Machines Corp., 618 F.2d 923, 929 (1980) Second Circuit.

> As Mr. Justice Frankfurter noted in *Wilkerson v. McCarthy*, 336 U.S. 53, 65, 69 S.Ct. 413, 419, 93 L.Ed 407 (1949) (Frankfurter, J., concurring), "A timid judge, like a biased judge, is intrinsically a lawless judge."

The Tenth Circuit Court of Appeals endorsed the District Courts "Amended Findings of Fact"[18] and affirmed its Conclusions of Law derived there from in its order of April 15, 2004.[19] Rendall explicitly pointed out that these Findings of Fact were tainted by "evidence not in the record"[20] (the non-existent video testimony of Dr. Jerry Fox who was a live witness at the trial). For the Judge to reach to an "extra judicial source" is bias and prejudice, which is intrinsically lawless, but in producing non-existent evidence in a court of law is fabrication of evidence, which this Court (the highest in the United States) must rule that:

> **"The Amended Findings of Fact by the U.S. District Court Judge Bruce B. Black has so far departed from the accepted and usual course of judicial proceedings and this was sanctioned by the Tenth Circuit Court of Appeals, which calls for an exercise of this Court's supervisory power." Supreme Court Rule 10(a).**

B. Justice in the courts of law of the United States is governed by the Federal Civil Judicial Procedure and Rules authorized by the U.S. Congress. As stated succinctly in Rule 1:

> "They shall be construed and administered to secure the **just**, speedy and inexpensive determination of every action."

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[18] Exhibit A 3, page 89
[19] Exhibit A 3, page 89
[20] Exhibit B 2, page 150

The word "administered" was added in 1993 to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved, **not only fairly**, but also without undue cost or delay.

The case in point is Rule 52(a), which in part states:

> "Findings of fact, whether based on oral or documentary evidence, **shall not be set aside unless clearly erroneous** and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Case law has proliferated in defining "clearly erroneous" but for the trial court to reach to evidence not in the record (the non-existent video testimony of a witness whose live testimony is in the transcripts)[21] is "unjust and unfair" and a miscarriage of justice.

The Amended Findings of Fact of Judge Bruce B. Black,[22] and the Conclusions of Law derived therefrom, must be set aside as "clearly erroneous" and the injunction and fines imposed upon Defendants Rendall and Campbell[23] voided as a miscarriage of justice.

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[21] Exhibit B 1, pages 113, 114, 115
[22] Exhibit A 2, page 39
[23] Exhibit A 4, page 91

C. The U.S. Constitution Amendment XIV grants to Defendants John S. Rendall and Herbert M. Campbell II, citizens of the United States, "the due process of law" and equal protection of the law." The Tenth Circuit Court of Appeals endorsed the District Court's Amended Findings of Fact,[24] over the objections of Defendant Rendall[25] that they were tainted by the Judge's use of evidence, which was non-existent (Dr. Jerry Fox's non-existent video testimony quoted as evidence when he was a live witness according to the transcript in the record).[26] Since the Court of Appeals did not have this so-called evidence of a video,[27] it did not have any basis to accept such evidence without "due process." Rendall and Campbell have been deprived of the equal protection of the law in the affirmation of conclusions law based on unlawful findings without any "due process".[28] It is a case of the "blind leading the blind" and the decision is requested to be reversed.

D. The Tenth Circuit of the U.S. Court of Appeals ordered the clerk of the District Court (D.N.M) in this case, CV 98-00860, to provide them with the record of the case being appealed by Rendall, *pro se*.[29] The eight-day trial encompassed several witnesses with documentary exhibits (500-1088) being testified to in evidentiary examination. The District Court did not have the exhibits of the record,[30] and

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[24] Exhibit A 3, page 89
[25] Exhibit B 2, page 150
[26] Exhibit B 1, pages 113, 114, 115
[27] Exhibit A 3, page 90
[28] Exhibit B 1, page 135
[29] Exhibit B 3, page 152
[30] Exhibit B 4, pages 155, 156

Rendall requested that the SEC, as officers of the Court, provide the Court of Appeals the Exhibits.[31] Further, Defendant Rendall procured a few certified copies of exhibits from the SEC and requested their admission.[32]

The final order of the Tenth Circuit Court of Appeals on April 15, 2004,[33] as an afterthought, denied Rendall's motion for the SEC to supply the Court of Appeals the exhibits of the record. By their own order, the Tenth Circuit Court of Appeals could not rule on "Evidence as not being part of the record" (at the very least), here they did not have the record. Chicago v. Eastern Ill. R.R. Co. v. Southern Ry. Co., 261 F.2d 394 (7th Cir. 1958). But this issue is even more clear cut. The Tenth Circuit Court of Appeals had the transcripts of the eight-day trial and, even if they could not rule on the District Court facts based on Dr. Jerry Fox's supposed video testimony, they certainly knew or should have known that, as Dr J. Fox was a live witness, any video testimony (if such existed) was inadmissible in a court of law. The entire Amended Findings of Fact of the District Court is tainted[34] and must be reversed with the injunction and the fines against Rendall and Campbell voided.

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[31] Exhibit B 3, page 154
[32] Exhibit B 4, page 156
[33] Exhibit A 3, page 90
[34] Exhibit A 2, page 39

IX. APPENDIX

A. Orders, findings of fact and conclusions of law in conjunction with the judgment sought to be reversed.

1. Order of the Court of Appeals (Tenth Circuit) dated August 4, 2003 remanding to District Court for evidence of "false and misleading" 17-38

2. Amended Findings of Fact and Conclusions of Law of the District Court (D.N.M.) dated September 24, 2004..... 39-85

3. Order of the Court of Appeals (Tenth Circuit) dated April 15, 2004, affirming judgment of the District Court. 86-90

4. Judgment of District Court dated May 16, 2000. 91-96

5. Order of the Court of Appeals (10th Circuit) denying Rendall's petition for rehearing and hearing *en banc* dated June 16, 2004. 97-98

B. Material required to show when and how the Federal questions sought to be reviewed were raised in the Court of Appeals.

1. Appellant's Supplemental Brief dated October 20, 2003 on the District Court's Amended Findings of Fact and Conclusions of Law of September 24, 2004 100-136

2. Appellant's Reply Brief dated November 21, 2003..... 137-151

3. John S. Rendall's motion dated February 23, 2001 for the exhibits of the record be submitted by the Securities and Exchange Commission..... 152-154

4. John S. Rendall's amended motion for the exhibits of the record be submitted by the Securities and Exchange Commission 155-156

5. Appellant Rendall's petition for panel rehearing and suggestion for hearing *en banc* filed in the Tenth Circuit U.S. Court of Appeals on May 28, 2004 157-170

For the aforementioned reasons, John S. Rendall and Herbert M. Campbell II respectfully request that this Court grant a Writ of Certiorari.

Dated: September 9, 2004

Respectfully submitted,

John S. Rendall, *Pro Se*

Herbert M. Campbell, *Pro Se*

EXHIBITS A1-5

EXHIBIT A 1

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

SOLV-EX CORPORATION,

Defendant,

and

JOHN S. RENDALL and HERBERT M. CAMPBELL,

Defendants-Appellants.

No. 00-2339
(D.C. No. CIV-98-860-BB)
(D.N.M.)

ORDER
Filed August 4, 2003

Before **HENRY, PORFILIO** AND **MURPHY,**
Circuit Judges

The Securities and Exchange Commission (SEC) brought this enforcement action against defendants Solv-Ex

Corporation, its CEO John Rendall, and its senior vice president and general counsel Herb Campbell, for alleged violations of § 17(a) of the Securities Act of 1933 (Securities Act), § 10(b) and § 13(a) of the Securities and Exchange Act of 1934 (Exchange Act), and the rules promulgated under those Acts. The SEC contended that, from January 1995 through April 1997, defendants issued a series of public statements in press releases, letters to shareholders, conference calls with investors and brokers, and filings with the SEC, that created the misleading impression that each of three technologies being developed by Solv-Ex was an unqualified success. The SEC asserted that "[t]he pattern of these statements created in the mind of any reasonable investor the expectation that commercial exploitation of the technologies, each with an attendant substantial revenue stream, was not only assured, but would occur in the very near future." R. Vol. IV. Doc. 90 at 1.

After an eight-day trial to the bench, the district court issued a lengthy written decision finding that defendants Rendall and Campbell made material misrepresentations and/or omissions in public statements and in filings with the SEC. The court imposed first tier civil penalties of $5,000 against each of them and permanently enjoined both men from future violations of § 17(a), § 10(b), and § 13(a). Now proceeding *pro se*, Rendall and Campbell each appeal. Because the district court's decision does not contain key factual findings that are essential to effective appellate review, we must make a limited remand to the district court to supplement its factual findings.

Factual Background

Rendall, an experienced chemical engineer, founded Solv-Ex in 1980 for the primary purpose of developing and implementing a new technology to process and recover

bitumen from oil sands.[1] Rendall was involved in all significant aspects of Solv-Ex's business. Campbell joined Solv-Ex in May 1992 after having worked in management positions for various mining companies. Campbell testified that to the extent there was a management team, he, Rendall, and John Butler were the people who ran things on a day-to-day basis at Solv-Ex. Among other things, Campbell "assumed primary responsibility for drafting press releases and reviewing public statements about [Solv Ex's] projects, and handling shareholder relations." Suppl. R. Vol. XIII, Doc. 120 at 4.

In the 1980's, Solv-Ex built a pilot plant and laboratory in Albuquerque, New Mexico, to further test and develop its new bitumen extraction process. A key component of this new process, which used hot water and steam rather than chemicals to separate the oil from the sand, was a piece of equipment known as the log washer. In 1988, Solv-ex acquired 100% of the working interest in a lease in the Athabasca oil sands of Alberta, Canada, known as Lease 5. After preparing a feasibility study and acquiring financing, Solv-Ex began construction of a plant on Lease 5 that would use the new bitumen extraction process. This new process for bitumen extraction was one of the three technologies about which the SEC contended defendants made materially false and misleading statements or material omissions

Although Solv-Ex's core technology was bitumen extraction, it also developed technologies to extract minerals from the clay sands as a by-produce of bitumen production. The primary mineral of interest to Solv-Ex was aluminum oxide, or alumina, which is used in electrolytic cells for the

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[1] Bitumen is a heavy oil with the consistency of tar.

production of metallic aluminum. Solv-Ex believed it could produce a unique kind of alumina that could remain in solution within the cell at much lower temperatures than alumina currently available on the market. Solv-Ex also worked on designing and constructing a new kind of electrolytic cell that would use this new alumina. This new electrolytic cell was the second technology about which the SEC alleged defendants made materially false or misleading statements or material omissions.

In producing alumina from the clay fines, Solv-Ex discovered a synthetic mineral that exhibited some qualities of brightness similar to that of titanium dioxide (Ti02), a naturally occurring mineral used as a high-end pigment in many industrial applications. Solv-Ex named its synthetic mineral "Ti02S," which stood for "Titanium dioxide substitute," and explored uses for this synthetic pigment in the paint, plastics, and paper industries. The development of Ti02S was the third technology about which the SEC alleged defendants made materially false or misleading statements or material omissions.

Elements of the Alleged Securities Fraud

Section 10(b) of the Exchange Act (15 U.S.C. § 78j(b)) and § 17(a) of the Securities Act (15 U.S.C. § 77q(a)) are general fraud provisions. Together with Rule 10b-5 (17 C.F.R. § 240.10b-5), they make it unlawful for a person or entity, in connection with the purchase or sale of a security, to employ any device, scheme, or artifice to defraud, to make an untrue statement of material fact, or to omit material fact that is necessary to make the statements made, in the light of the circumstances under which it was made, not misleading. Section 13(a) of the Exchange Act (15 U.S.C. § 78m(a)) requires the issuer of a security to file annual and quarterly reports with the SEC, and Rule 12b-20 (17 C.F.R. § 240.12b-

20) provides that required filings with the SEC must include "such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made[,] not misleading."

Both the Securities Act and the Exchange Act expressly authorize the SEC to bring a civil enforcement action seeking injunctive relief whenever it appears that a person is engaged, or is about to be engaged, in activities that violate the respective Acts or the rules promulgated thereunder. 15 U.S.C. § 77t(b) (Securities Act); *id.* § 78u(d)(1) (Exchange Act). Both Acts also authorize the SEC to seek monetary penalties for violations of the respective Acts or the rules promulgated thereunder. *Id.* § 77t(d)(1) (Securities Act); *id.* § 78u(d)(3)(A) (Exchange Act).

Because the SEC is statutorily authorized to bring an enforcement action, it does not have to prove those elements that a private person must prove to establish his standing to bring an action. In particular, the SEC does not have to prove that any investor either relied upon or was injured by the material misstatement or omission. *See SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1363 n.4, 1364 (9th Cir. 1993) (action under § 10(b) and Rule 10b-5); *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985) (same); *Kramas v. Sec. Gas & Oil Inc.*, 672 F.2d 766, 770 (9th Cir. 1982) (private action under § 17(a)).

The SEC does, however, have to prove those elements that establish the wrongful conduct and, thus, the securities law violation. To establish a violation of § 10(b) and Rule 10b-5, the SEC must prove that each defendant: "(1) made a material misrepresentation or a material omission as to which he had a duty to speak, or used a fraudulent device; (2) with scienter; (3) in connection with the purchase or sale of securities." *SEC v. Monarch Funding*

Corp., 192 F.3d 295, 308 (2d Cir. 1999). "Essentially the same elements are required under Section 17(a)(1)-(3) in connection with the offer or sale of a security, though no showing of scienter is required for the SEC to obtain an injunction under subsections (a)(2) or (a)(3)."[2] *Id. (citing, inter alia, Aaron v. SEC*, 446 U.S. 680, 701-02 (1980)). The SEC need not prove scienter in a civil enforcement action under § 13(a) for filing false or misleading reports with the SEC. *SEC v. McNulty*, 137 F.3d 732, 740-41 (2d Cir. 1998). It need only establish that the defendant filed a required report with the SEC that contained information that was materially false or misleading or omitted material facts.

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[2] Section 17(a) provides as follows:

(a) Use of interstate commerce for purpose of fraud or deceit

It shall be unlawful for any person in the offer or sale of any securities or any security-based swap agreement (as defined in Section 206B of the Gramm-Leach-Bliley Act) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly.

(1) to employ any device, scheme or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material face necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Requirements of Fed. R. Civ. P. Rule 52(a)

In actions tried on the facts without a jury, Fed. R. Civ. P. 52(a) requires the trial court to "find the facts specially and state separately its conclusions of law thereon." "[T]he touchstone for whether findings of fact satisfy Rule 52(a) is whether they are sufficient to indicate the factual basis for the court's general conclusion as to ultimate facts so as to facilitate a meaningful review of the issues presented." *Joseph A. ex rel. Wolfe v. N.M. Dep't of Human Servs.*, 69 F.3d 1081, 1087 (10th Cir. 1995) (quotations omitted). "Where the trial court provides only conclusory findings, unsupported by subsidiary findings or by an explication of the court's reasoning with respect to the relevant facts, a reviewing court simply is unable to determine whether or not those facts are clearly erroneous." *Roberts v. Metro. Life Ins. Co.*, 808 F.2d 1387, 1390-91 (10th Cir. 1987) (quotation omitted). Here, although the district court made lengthy findings of fact, there are some important gaps the preclude effective appellate review of most of the issues raised on appeal. Therefore, we must make a limited remand to the district court for further factual findings and explications of its reasoning, as we explain below.

Materially False or Misleading Statements and/or Omissions in Public Statements other than SEC Filings

1. Which Public Iterations Were Actionable?

The district court found that Rendall and Campbell made numerous false or misleading statements and that at least three of them were material. These three material misrepresentations relate to each of the three technologies, respectively. They are as follows: 1) "that commercial-scale production of bitumen oil had begun on March 29 at the Solv-Ex plant in Alberta, Canada;" 2) "that the testing of a

purportedly revolutionary 2700 ampere electrolytic cell used for the production of metallic aluminum had been 'successful' and was therefore going to be scaled up;" and 3) "that an industrial mineral created from the by-produce of Solv-Ex's bitumen extraction technology, Ti02S, had been shown to be suitable for certain applications in the paint and plastics industries. Statements regarding the potential for Ti02S in the paper industry were largely unproven and therefore overly optimistic." R. Suppl. Vol. XIII, Doc. 120 at 36.

In setting out these three material misrepresentations, the district court did not specify when and by whom each of these misrepresentations was made.[3] We will assume, however, that the court intended to include at least those iterations of the misrepresentations to which it referred in its subsidiary findings. Those findings refer to three public iterations of the first material misrepresentation, relating to bitumen production: A March 31, 1997 press release; and April 7, 1997 conference call; and an April 30, 1997 press release.

The subsidiary findings refer to six public iterations of the second material misrepresentation, relating to the electrolytic cell: a February 26, 1996 press release; a March 11, 1996 press release; an August 26, 1996 letter to

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[3] The identity of the speaker is obviously relevant for liability purposes. The timing of the statement may also be relevant because liability depends on what the speaker knew at the time he made the statement. Thus, a statement that may not have been actionable when first made, in light of what the speaker knew at the time, may become actionable on subsequent repetition if new facts have since come to light that reveal the false or misleading nature of the statement to the speaker.

shareholders; a September 5, 1996 conference call; a September 10, 1996 press release; and a December 3, 1996 conference call. The subsidiary findings do not mention the first and most complete iteration of this representation: the January 23, 1996 press release that was issued shortly after the test of the 2700 ampere cell. It is unclear whether the district court merely overlooked this press release in its findings, or whether it purposely omitted mention of the press release due, perhaps, to its timing or some other fact. On remand, the district court should clarify whether it intended to include the January 23, 1996 press release among the public statements it found to be materially false or misleading.

When we come to the third material misrepresentation the district court found defendants made, we run into further difficulties. This third misrepresentation is composed of two parts the first of which poses no problem. The district court found that defendants misrepresented that "an industrial mineral created from the by-product of Solv-Ex's bitumen extraction technology, Ti02S, had been shown to be suitable for certain applications in the paint and plastics industries." *Id.* The subsidiary findings refer to two public statements that contain representations as to Ti02S's suitability for applications in the paint and plastics industries: a September 5, 1996 conference call; and a September 6, 1996 press release.

The second part of the misrepresentation is not so straightforward The district court found that "[s]tatements regarding the potential for Ti02S in the paper industry were largely unproven and therefore overly optimistic." *Id.* This finding is extremely vague, especially in light of the record evidence and the district court's subsidiary findings. The record reveals many different statements by one defendant or the other about Ti02S's potential as it relates to the paper

industry. Likewise, the district court made numerous subsidiary findings about Ti02S as it relates to the paper industry. Some of these findings concern statements about the production of TI-2S, some concern statements about past test results, and some concern statements about future testing. Only one subsidiary finding concerns a statement about Ti02S's potential *use* in the paper industry. That statement was made in a September 6, 1996 press release, which said that "independent testing to date" showed Ti02S appears quite suitable for the huge filler markets in paper." *Id.* at 21. The district court's use of the plural "statements" in its finding that "[s]tatements regarding the potential for Ti02S in the paper industry were largely unproven and therefore overly optimistic," however, suggests that it had more in mind than this single statement. Perhaps the court was referring to statements about potential production and/or testing of TI02S, as well. From our review of the court's decision, however, we cannot accurately ascertain which other statements about Ti02S the district court found to be actionable. On remand, the district court should identify which statements by Campbell and/or Rendall about Ti02S's potential as it relates to the paper industry, the court found to be materially false or misleading.

2. What was false about the statement and/or what material facts were omitted that should have been included to make the statements not misleading?

The district court's ultimate findings of material misrepresentation also do not identify exactly what was false or misleading about defendants' statements, including what material facts should have been disclosed to make the statements not misleading. While the district court's subsidiary findings include numerous facts that our review shows were not revealed in defendants' public statements, the court made no findings as to which of those omitted facts

were material.

For instance, with regard to defendants' representations that commercial-scale production of bitumen had begun at the Alberta plant on March 29, the district court made the following subsidiary findings: 1) during the March 29 run of the log washer circuit, installation of the automatic instrumentation had not been completed; 2) Solv-Ex personnel determined that modifications in the water circulation and clarification circuit would be necessary to achieve continuous operation; 3) the log washer had to be shut down after only twelve hours due to an unexpected build-up of solids in the pump box; 4) Solv-Ex was not able to filter bitumen successfully at the Lease 5 plant until April 21, 1997, at which time it produced only two 55-gallon drums; 5) Solv-Ex was not able to duplicate the production of filtered bitumen thereafter; 6) only after two or three cycles of operation, the log washer circuit again developed operational problems on April 21 and had to be shut down; 7) in fact, after the log washer was shut down initially on March 29, it was not operated thereafter except for isolated test and demonstration runs of no more than six hours; and 8) Solv-Ex was never able to sustain continuous operation of the log washer at the Alberta plant.

If we compare these subsidiary findings to the defendants' relevant public statements of March 31, April 7, and April 30, we can determine which facts were omitted from those public statements. But we cannot determine which of the omitted facts the district court found to be material. Materiality is a "fact-specific inquiry" that "depends on the significance the reasonable investor would place on the withheld or misrepresented information." *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988). Findings as to materiality are for the district court to make in the first instance.

We face the same problem with regard to the other two representations the district court found to be materially misleading. Even if we could determine what facts recited by the district court are missing from the relevant public statements about the cell and about Ti02S,[4] we cannot determine which of those facts the court found to be material. On remand, the district court should make additional findings as to what was false or misleading about the relevant statements by defendants, including what material facts were omitted, if any.

Scienter

Additional findings by the district court as to what material facts defendants failed to disclose are also essential to our review of the issue of scienter with respect to the claims under § 10(b) and § 17(a)(1). Scienter is a "mental state embracing intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193-94 n.12 (1976) The scienter element may be satisfied by conduct that is reckless, which we have defined in the securities fraud context as "conduct that is an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1232 (10th Cir. 1996) (quotation omitted).

"Courts have been cautious about imposing liability for securities fraud based on reckless conduct, however."

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[4] And as previously discussed, we cannot even be sure which public statements about those two technologies the district court found to be actionable.

City of Phila. v. Fleming Cos., Inc., 264 F.3d 1245, 1260 (10th Cir. 2001). A finding of scienter cannot be based on "fraud by hindsight, for example, because corporate officials should be liable for failing to reveal only those material facts reasonably available to them." *Id.* (quotations omitted). Also, that a defendant knew facts that the court later determines "to have been material, without more, is not sufficient to demonstrate that the defendant intentionally withheld those facts from, or recklessly disregarded the importance of those facts to, a company's shareholders in order to deceive, manipulate, or defraud." *Id.*

We have held that , "to establish scienter in a securities fraud case alleging non-disclosure of potentially material facts, the plaintiff must demonstrate: (1) the defendant knew of the potentially material fact, and (2) the defendant knew that failure to reveal the potentially material fact would likely mislead investors." *Id.* at 1261. Recklessness may satisfy the knowledge requirement under this scenario if the defendant has "knowledge of a fact that was so obviously material that the defendant must have been aware both of its materiality and that its non-disclosure would likely mislead investors." *Id.*

The district court's findings touch very little on either Rendall's or Campbell's state of mind. The court did find that "Solv-Ex, Rendall and Campbell knew, or were reckless in not knowing, several of the material statements they issued were false and misleading[,]" but the court did not specify the statements to which it referred. R. Suppl. Vol. XIII, Doc. 120 at 38. The court's subsidiary findings do not otherwise provide us a clear understanding of the factual basis for the court's ruling as to scienter. Although the court did make specific findings as to one or the other defendant's knowledge of a few facts, it did not make similar findings as to many other facts. We cannot effectively review the

question of scienter without knowing which material facts the district court determined each defendant knew. For example, Campbell testified that he did not have actual knowledge of a host of facts on which the SEC relied in arguing that his statements were materially false or misleading. The district court 's decision does not reveal whether the court disbelieved this testimony, or whether the court believed it, but nonetheless imputed knowledge of certain facts to Campbell.

Further, Campbell contended that he consulted with Rendall and other scientists before drafting any public statement and that he had no duty to look behind their representations and read the technical reports himself. The district court's decision suggests that it concluded that Campbell did have a duty to read the technical reports. *See id.* at 37 (stating that Campbell "had access to all of the negative tests and consultants' caveats which he chose to largely ignore in drafting the press releases"). If the court did impose such a duty on Campbell, the scope of that duty is not apparent from the court's decision.

For instance, the court may have concluded that Campbell had an absolute duty to ascertain the facts firsthand by reading the technical reports before he drafted any public statement about the technologies. Or, the court may have concluded that while Campbell ordinarily could have relied on the technical information he received from conversations with Rendall and others, he knew certain facts that made that reliance unreasonable and triggered a duty to independently verify the information by reading the reports himself. We express no opinion as to whether either of these theories would be factually or legally supportable. We mention them only to illustrate that we have no clear understanding of the basis for the court's ruling as to scienter.

On remand, the district court should make additional findings addressing what each defendant knew. If the court did impute knowledge of any facts to either defendant, it should explain the legal and factual basis for that imputation.

Materially False or Misleading Statements or Omissions in SEC Filings

The district found that "Solv-Ex filed materially false reports with the Commission, and filed reports with the Commission that, in addition to the information expressly required to be included in the report, failed to include such further material information as was necessary to make the required statements, in the light of the circumstances under which they were made, not misleading." *Id.* at 39. The district court did not, however, identify the filings to which it was referring. Looking elsewhere in the district court's decision, we find a reference to the Form 10-K for FY1995 and a reference to the Form 10-K and amended Form 10-K for FY1996. The Court recited certain disclosures in the FY1995 Form 10-K, but did not state that those disclosures were false or misleading in any way. *Id.* at 29. The court found that the FY1996 Form 10-K and amended Form 10-K "contained misleading statements regarding the status of Solv-Ex's aluminum reduction cell testing and technology." but it did not specify which of the statements about the cell and its technology in either of those filings were misleading. *Id.* at 32.

To effectively review the propriety of the court's finding that Solv-Ex filed periodic reports with the SEC that were materially false and omitted material facts necessary to make them not misleading, we must be able to ascertain which filings and which statements within those filings the district court found to be materially false or misleading. And we must be able to ascertain what facts that were omitted

from those statements the district court found to be material. At present, we cannot ascertain any of that information absent additional findings by the district court.

Issues Not Affected by the Need for More Findings

Although most of the issues raised by Rendall and Campbell on appeal require more findings from the district court for their resolution, a few do not. In particular, we do not need additional findings in order to decide whether the SEC was required to prove either that investors relied on defendants' statements or that those statements caused the fluctuations in stock price that led to investor injury. As our earlier recitation of the elements of the SEC's claims reveals, the SEC did not have to prove either that any investor relied on defendants' statements or that any investor was injured by those statements. That the SEC may have argued either reliance or causation as part of its case does not alter its ultimate legal burden.

Nor do we need additional findings to determine whether the district court abused its discretion in excluding certain evidence defendants claim was relevant to the materiality of their statements, to investor reliance, and to causation. We review the district court's evidentiary rulings under an abuse of discretion standard, "considering the whole record and reversing only if there is a firm and definite belief the trial court made a clear error in judgment." *United States v. Marshall*, 307 F.3d 1267, 1269 (10th Cir. 2002).

One of the defendants' theories at trial was that during the relevant period, a group of short-sellers were trying to manipulate the price of Solv-Ex stock for their own gain by, among other things, launching a barrage of negative publicity about Solv-Ex and its technologies. Defendants argued that the evidence would show the short-sellers were

successful in driving the market, while defendants' own public statements had no effect. Defendants contended that because their public statements had no effect on the price of Solv-Ex stock, those statements could not have been either material to any investor or the cause of any investor loss.

To support their theory, defendants attempted to introduce testimony showing that the price of Solv-Ex stock did not always go up in reaction to positive public statements by defendants; in fact, the price sometimes went down despite defendants' positive public statements, due to the actions of short-sellers. The SEC objected to both Rendall's and Campbell's testimony on this matter. The district court sustained the SEC's objections, but did permit counsel to make an offer of proof.

Defendants made the following offer of proof:

> The tender would be that I'll have Mr. Campbell discuss what happened to the price in February and March, 1996; their various press releases - I was going to show him some that relate to the repeated disclosure of the aluminum cell test. One on February the 23, and a second one on March 21. And the price - with respect to the February 21, the price of that date declined substantially. March 21, it went up a minor amount, less than a point. And then along came this negative publicity he just mentioned from the Wall Street Journal, Barron's Dan Dorfman, just back to back, three days in a row, right after the most positive announcement the company ever made, and the stock declined 70 percent; from 21 to 7, which we think shows there are other influences in the market, and it's certainly not Solv-Ex's public statements that are driving the price of the stock upward. That's the tender.

Id. at 1283. Although counsel did not explicitly include any exhibits in his tender, it is apparent from a discussion at the conclusion of the trial both that counsel intended to tender to include exhibits and that the court understood them to be included. *See* R. Suppl. Vol. VI at 1570-71. We assume the exhibits intended to be tendered included Exhibits 865-1049.

On appeal, both defendants argue that the court erred in excluding the tendered evidence. They contend that the excluded evidence was part of the total mix of information available to investors, so the district court should have considered it in making its assessment of materiality. They further contend that had the court considered the excluded evidence, that evidence would have established that none of defendants' statements were material.

As we noted earlier, materiality is a "fact-specific inquiry" that "depends on the significance the reasonable investor would place on the withheld or misrepresented information," *Basic Inc.*, 485 U.S. at 240. "[A]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to [act]." *Id.* at 231 (quotation omitted). In other words, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." *Id.* at 231-32 (quotations omitted).

The negative publicity about Solv-Ex was part of the total mix of information available to investors and, to that extent, was relevant to the issue of materiality. The excluded evidence was not the only evidence of negative publicity before the court, however, and the court indicated that it was well aware and that there was substantial negative publicity

about Solv-Ex during the relevant period. To the extent the excluded evidence related to other activities of short-sellers or to fluctuations in the price of Solv-Ex stock, it had little if any relevance to the issue of materiality. Even if relevant, however, none of the excluded evidence established what defendants argue: that none of their own public statements were material.

First, even if the market did not reflect a direct correlation between the issuance of positive public statements by defendants and the price of Solv-Ex stock, that does not mean that defendants' statements were immaterial. Their positive public statements may well have buffered what otherwise would have been a greater drop in the stock price. Moreover, even if investors were aware of negative publicity about Solv-Ex from third-party sources, that does not mean that defendants' own statements were not material. "Ordinarily, omissions by corporate insiders are not rendered immaterial by the fact that the omitted facts are otherwise available to the public." *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1114 (9th Cir. 1989).

There is a significant difference between information provided by third parties and information provided by corporate insiders, especially as regards the status of research and development of new technologies. *Cf. Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1091 (1991) ("Shareholders know that directors usually have knowledge and expertness far exceeding the normal investor's resources....").
Campbell himself acknowledged this difference when, in response to a question whether negative publicity about Solv-Ex's technology caused him to question that technology, he testified that it did not because the reports were made by people who had not talked to Solv-Ex or seen the technology firsthand. "[H]ow could they know what they are talking about? They've never seen the technology. They didn't even

know what it was. You say that should make me suspicious. I hardly think so." R. Suppl. Vol. IV at 1115.

The three groups of defendants' statements that the district court found to be materially false or misleading all related to matters that a reasonable investor would expect a corporate insider to have considerably more knowledge of than any third party. Thus, the inclusion of negative statements from third parties in the general mix of information about Solv-Ex did not negate the materiality of defendants' own statements. *Cf. In re Apple Computer Sec. Litig.*, 886 F.2d at 1114 (holding that under fraud on the market theory, the facts omitted by corporate insider must be "transmitted to the market with roughly equal intensity and credibility, [for] the market [to] receive complete and accurate information").

Because other evidence of negative publicity about Solv-Ex was introduced at trial, and because the excluded evidence did not negate the materiality of the statements the district court found to be false and misleading, we conclude that the district court did not abuse its discretion in excluding the tendered evidence on the issue of materiality. Nor did the court abuse its discretion in excluding the evidence to the extent it was relevant to either investor reliance or causation. As we held earlier, neither of those matters were properly at issue in this SEC enforcement action.[5]

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[5] Rendall also makes a related argument on appeal that the magistrate judge erred in striking several of defendants' affirmative defenses that were based on the actions of third parties in the market. The record does not reflect that defendants ever sought reconsideration of that order before the district court. "[A]ppellate courts are without power to hear appeals directly from orders of federal magistrates." *Pippinger v. Rubin*, 129 F.3d 519, 533 (10th

Conclusion

The remaining issues that Rendall and Campbell raise on appeal are affected by our need for additional findings from the district court. Therefore, we will not address them at this time. Instead, we will remand to the district court for the limited purpose of making additional findings of fact, and conclusions of law where necessary, in accordance with our discussion above and with the following directive.

On remand, the district court should 1) clarify whether it intended to include the January 23, 1996 press release among the public statements it found to be materially false or misleading; 2) identify what statements Rendall and/or Campbell made about Ti02S's potential for use in the paper industry that were materially false or misleading; 3) identify what material facts were omitted from the three statements set forth in Conclusions of Law ¶ 11 of the Court's Findings of Fact and Conclusions of Law that should have been included so as not to make the statements misleading; 4) identify what material facts that were omitted or falsely stated that Rendall knew or what material facts that were omitted or falsely stated that Campbell knew; 5) clarify whether the court imputed knowledge of any material fact to

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(Continued)
Cir. 1997) the magistrate judge's order, "we may not consider the issues decided in that order on appeal." *Id.* at 534.

either Rendall or Campbell and, if so, the factual and legal basis for that imputation; and 6) identify what filings with the SEC and which statements within those filings were materially false or misleading, and identify what material facts were omitted from those statements that should have been included to make the statements not misleading.

This court will retain jurisdiction of this appeal pending the district court's further rulings, which shall be certified to this court as a supplemental record.

IT IS SO ORDERED.

Entered for the Court
PATRICK FISHER, Clerk

By: s/Karen Phillips
Deputy Clerk

EXHIBIT A 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

No. CIV 98-860 BB

SOLV-EX CORPORATION,

Defendant,

and

JOHN S. RENDALL and HERBERT M. CAMPBELL,

Defendants-Appellants.

COURT'S AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER came on for a trial to the Court without a jury on December 20, 21, 22 and 23, 1999, and February 24, 25, 28, and 29, 2000, and all evidence having been presented, having considered the parties' proposed findings and conclusions, and having reviewed the relevant law, the Court now files its amended findings of fact and conclusions of law:

Findings of Fact

History and Background of the Defendants

1. Solv-Ex, a New Mexico corporation, was formed in 1980 to engage in research and development of improving, as well as developing, technology to process and recover bitumen (heavy, low specific gravity crude oil) from oil sands. Ex. 863, pp. 1, 42. Solv-Ex publicly raised several million dollars through an initial public offering and private offerings to engage in such research and development activities.

2. John Rendall was the principal founder of Solv-Ex. Since its inception, Mr. Rendall has been Solv-Ex's Chairman, CEO, and larges individual shareholder. As Solv-Ex's Chairman and CEO, Mr. Rendall has been involved in all significant matters involving the Company.

3. Prior to incorporating Solv-Ex, Mr. Rendall's professional career for the period 1959 through 1979 involved designing, commissioning, operating and managing more than ten chemical, petrochemical and industrial plants in England. Mr. Rendall joint-ventured a company he started with Rio Tinto Zinc ("RTZ") to market his extractive processes, including technology to make oil from oil sands. The Athabasca sand in the northern region of Alberta, Canada, contains bitumen. In connection with the RTZ joint venture, Mr. Rendall established a process that extracted oil from the Athabasca tar sands and assisted in the construction of a pilot plant to test that process located near Fort McMurray, Alberta, Canada, in 1976. The process involved the use of

solvents in extracting oil from tar sands. IN 1979, Mr. Rendall discovered that a commonly available piece of equipment, known as a logwasher, had the capacity to separate oil from the crushed rocks, sand, water and fine clay residue and he patented that process.

4. In the 1980's, Solv-Ex built a pilot plant and laboratory in Albuquerque, New Mexico to further develop, test and improve upon the process for extracting oil from bitumen. At the time, the process was a solvent assisted hot water process intended to provide high bitumen recovery rates for a wide range of ore grades, while producing waste tailings which were more environmentally acceptable.

5. In 1988, Solv-Ex acquired 100% of the working interest in the Bitumount lease in Alberta, Canada, known as "Lease 5" which covered 5,874 acres. On January 6, 1989, Drs. George S. Pemberton and Michael S. Ranger, Professors of Geology at the University of Alberta, issued a report entitled "Geology of the Solv-Ex Corporation Athabasca Oil Sands Lease Including Bitumen and Titanium Reserve," which estimated reserves at 1.127 billion barrels of bitumen.

6. In May 1992, Herbert Campbell joined Solv-Ex as senior vice president and general counsel. Prior to joining Solv-Ex, Mr. Campbell had worked in various management positions for mining companies, including the raising of venture capital. Since NASDAQ had threatened to suspend the listing for Solv-Ex, one of his first duties was to satisfy the demands of that stock exchange. His other duties included preparation of a business plan to assist in

raising working capital for Solv-Ex, negotiating and preparing an agreement with the Alberta Oil Sands Technical Research Authority to fund pilot plant testing of bitumen tailings, and engaging in efforts to raise capital to build a minerals processing plant. Later, Mr. Campbell's duties covered negotiating and preparing the acquisition of another oil sands lease in the Athabasca region, negotiating and preparing agreements with outside consultants who assisted Solv-Ex in the evaluation and development of its processes, and raising capital to build oil extraction and minerals production facilities. Mr. Campbell also assumed primary responsibility for drafting press releases and reviewing public statements about those projects. He also had those statements disseminated to the business community through the Business Wire. He also drafted portions of the Company's periodic reports between 1995-1997 and handled shareholder relations as well as performed the duties of Corporate Secretary and General Counsel.

7. There are three generally accepted steps in the evolution of taking an idea from the drawing board to producing a product or improving upon a process to achieve commercial production. First, the initial discovery, testing and development of the process or product is done under controlled laboratory conditions or "bench scale" testing. Second, the product or process should be tested and proven in an intermediate step, usually, a pilot plant or prototype model, that is larger and more elaborate than the laboratory, but not fully up to scale of a commercial application. Third, the process or product must be proven in a commercial plant. The likelihood of a financially viable project cannot be reliably predicted

until the process reaches this third stage. Solv-Ex operated its bitumen extraction technology only at the laboratory and pilot plant scale from February 1995 through December 1996. The electrolytic cell and Ti02 products never proved successful beyond the scale or bench level. From 1995 to 1997, however, Solv-Ex press releases, shareholder letters, and SEC filings created the impression each of these processes was moving forward with great success.

Bitumen Production

8. In a conference call held on May 18, 1995, Mr. Rendall indicated that a marketing contract for the oil is at hand and should be announced before "we get into financing." Ex. 769, pp. 6, 8.

9. In May 1995, Mr. Rendall also signed a glowingly optimistic letter to shareholders indicating Lease 5 was "estimated to contain one billion barrels of oil" and "the project to produce synthetic minerals, including alumina, from the Suncor tailings ponds, could be in production by the end of the year." Rendall also represented, "we have nearly completed our electrolytic test cell for production of aluminum metal and expect to have it operational in the near future." Ex. 766. Since the scale level cell had not even been tested, much less the prototype, it was highly optimistic to postulate it could be operational "in the near future."

10. In Jun 1995, Solv-Ex signed a letter of intent with Gibson Petroleum Company, Ltd. ("Gibson") to enter into a marketing agreement whereby Gibson would market a visbroken bitumen product to be produced by Solv-Ex at a proposed plant to be built at Least 5.

Ex. 107. Visbreaking is a thermal process utilized to break down heavy molecules into lighter molecules, in order to produce from bitumen in a lighter product such as gasoline, as well as a heavy residue product. Logwinuk video testimony.

11. According to Mr. Campbell, the Gibson letter of intent was particularly important because unless you had a market outlet for it, financing would not follow.

12. On July 24, 1995, Solv-Ex announced in a press release that it acquired the Fort Hills oil sands lease, located adjacent to Lease 5, covering approximately 50,000 acres and containing, according to preliminary estimates, approximately 3 billion barrels of recoverable oil. Ex. 775, ¶ 1.

13. By August 1, 1995, Solv-Ex reported to its shareholders that the permit applications and Environmental Impact Assessment for development of Lease 5 had been filed with the Canadian government. Ex. 776, p. 1.

14. In the September 26, 1995 press release, Mr. Rendall stated that the upgraded bitumen process together with the Gibson marketing agreement "assures product marketability and should yield production in excess of design capacity of 14,000 barrels a day of heavy oil, according to the final audit report." Ex. 781, ¶ 1. Plant "commissioning ... (is) targeted for late 1996." Id., at ¶ 5. Financial presentations have been well received according to Solv-Ex's financial consultant, Charter Oak Capital. Id., at ¶ 6. The proposed plant was to consist of four logwasher "circuits." Exs. 104, 106, 506.

15. In the December 12, 1995 press release, Solv-Ex announced that it received formal approval from the Alberta Energy and Utilities Board to proceed with construction on Lease 5 of the oil extraction plant (with subsequent construction of a minerals processing plant to follow). Ex. 787, ¶¶ 1, 2. The target date for commencing production of the oil extraction facility was to be late 1996 or early 1997. Id., at ¶ 5. The capacity could exceed 10,000 barrels of oil per day depending on the blend and the feed rate of the bitumen. Id., at ¶ 1. At the request of Solv-Ex, the permit characterized the plant or project as "experimental" in order to ensure that: (i) the royalty to be received by the Crown on production would be limited to one percent (1%) until Solv-Ex requested commercial status for the plant; (ii) Solv-Ex would not be prejudiced in applying for certain research and development tax credits for the new plant under Canadian tax law; and (iii) no public hearings would be needed to secure the additional necessary permits. Ex. 520.

16. On January 17, 1996, Solv-Ex announced in a press release that it had entered into a letter of intent with Ledcor Industries, Ltd. for construction of the planned 14,000-barrel-per-day oil extraction and upgrading plant on Lease 5 (at an estimated capital cost of $100 million). Ex. 792, ¶ 1.

17. Solv-Ex raised $73 million from various sources, including investors, in 1996.

18. Mr. Rendall stated in a conference call on February 9, 1996 that Solv-Ex's objective was to produce oil at $5 to $6 per barrel in early 1997. Ex. 795, pp. 4,

5. Mr. Rendall also stated that approximately $200 million was needed to complete all of Solv-Ex's projects. Id. at p. 9.

19. In a conference call on March 26, 1996, Mr. Rendall stated that the schedule envisioned meeting the objective of completing construction by year-end, with planned cash flow by mid-1997 and full production by year-end 1997. Ex. 802, pp. 3, 14, 15.

20. In the August 19, 1996 conference call, Mr. Rendall expressed Solv-Ex's intent, based upon available capital, to start production in the first quarter of 1997.

21. In the August 22, 1996 press release, Mr. Rendall stated, "We have sufficient funds on hand to ensure our facility will become operational on a commercial basis...(and) that the project is on schedule and under budget" during the first quarter of 1997. Ex. 812, ¶ 2. Mr. Rendall also indicated that there were delays in completing total financing caused by skeptical reports in the media about the viability of the Solv-Ex bitumen extraction process. Ex. 812, ¶ 3. Mr. Rendall further stated that "it has been necessary for us to adapt to the new circumstances in order to begin generating positive cash flow early next year and reach full production of pipelineable oil products later in the year." Id.

22. In the August 26, 1996 conference call, Mr. Rendall reported that construction was continuing and expressed the belief that Solv-Ex had the funds available to get into cash flow in the first quarter of 1997 if the plant was commissioned. Ex. 813, pp. 4-5.

23. At about this time, Solv-Ex realized they could not afford a visbreaker, so they decided to try to filter the bitumen to produce a much coarser product. Unprocessed bitumen is very difficult to filter because of its viscosity, "like trying to filter cold molasses or tar." Logwinuk video testimony.

24. To be salable, the bitumen recovered from oil sands must contain no more than .5% solids after it is separated from the sand. Ex. 20. To be pipelineable, bitumen must be "residue free." Ex. 104; Logwinuk trial testimony. Bitumen which cannot be transported by pipeline must be transported to buyers by truck. Exs. 104, 106.

25. In an August 26, 1996 letter to shareholders, Mr. Rendall stated that, although Solv-Ex still intended to produce "in excess of 14,000 per day of pipelineable oil ...in 1997," the company would instead commence production in early 1997 of "100,000 barrels per month" of filtered bitumen which would e "readily marketable" as a means of generating cash flow. Ex. 20. He publicly announced in the August 26, 1996 letter that Solv-Ex had now established through internal and independent testing that it could consistently produce filtered bitumen from Lease 5 which met the .5% solids specification necessary for marketability without using the visbreaker. Id. This statement was without factual support and misleadingly optimistic as the independent lab work on filtration performed for Solv-Ex in August 1996 was not conducted on material from Lease 5; rather, it was conducted on a reconstituted material made from previously-processed oil sands extracted from a location outside Lease 5. Metcalf I, 140-143; Ex.

112. Nor did the results of those tests justify the conclusion Solv-Ex could consistently produce "readily marketable" bitumen through filtration.

26. Both Campbell and Rendall knew the letter of intent with Gibson required a visbroken product and that they had not even presented, much less executed, a marketing arrangement for the filtered bitumen. However, they failed to disclose that they had no proven way to filter the bitumen and that they had no marketing agreement to sell the filtered product even if they could produce it. The failure to disclose these facts was material and made the August 26 letter to shareholders misleading.

27. On October 1, 1996, Solv-Ex first submitted an order to the Mott Corporation to begin design and then construction of a 44-inch filter for installation at the Lease 5 plant in hopes it could be used to filter the bitumen on a production level. This was completely unproven technology. Nonetheless, in the October 18, 1996 conference call, Mr. Rendall stated that he saw no delays to the company's targets for completing the oil extraction plant for commissioning in the first quarter of 1997. Ex. 824, p. 1.

28. In an October 14, 1996 telephone conference call with investors, securities analysts and broker-dealers, Mr. Rendall reiterated that production of filtered bitumen would commence during the first quarter of 1997. Ex. 25. During the same conference call, Mr. Campbell stated that the bitumen to be produced would meet "commonly accepted specifications, both in terms of contained water and solids." Ex. 25, p. 3. Given that sand from Lease 5 had never been processed and Mott had only been retained to begin

to design a completely untested filter only two weeks earlier, these statements were without factual basis and completely unrealistic Both Campbell and Rendall failed to disclose they had no proven technology to filter Lease 5 bitumen or a committed marketer for such a product.

29. On October 28, 1996, Solv-Ex announced that it was "on target to achieve production of heavy oil during the first quarter of 1997" at Lease 5. Ex. 26A. In the press release, Solv-Ex characterized the anticipated start-up as "a 'major milestone' which will establish the capabilities of its technology on a fully operational basis." Ex. 26A.

30. On November 27, 1996, Solv-Ex reiterated that it was currently constructing its Lease 5 plant, "with production scheduled for the first quarter of 1997." Ex. 29.

31. When it is clear the 44-inch production scale filter could not be designed and constructed in time to meet the widely publicized production schedule, Mr. Rendall directed Solv-Ex personnel to order a prototype 24-inch diameter Mott filter in November 1996. Fox video testimony.

32. In the December 3, 1996 conference call, Mr. Rendall stated:

> "[W]e are still on track with production of oil. Our schedule is for oil in the first quarter of 1997, and testing of the log washer with its ancillary fines reduction equipment will occur in December and January. Plus we are within our

> budge…[W]e plan to establish our pipelineable crude product by the fourth quarter of 1997, using a hydrovisbreaker …[A]s to the oil itself, the quality of the oil is exactly as currently being marketed by Gibson in the market."

Many aspects of this statement are false. Without proven technology, there was no realistic possibility the testing could occur in December or oil production in the first quarter of 1997. There was also no evidence Solv-Ex was or could produce the quality of oil currently being marketed by Gibson.

33. In response to a question as to whether Gibson had made any financial commitment during the same conference call, Mr. Campbell said, "Gibson is, in fact, moving forward towards securing equipment for the purpose of moving Solv-Ex's product to market." This was a false statement as Gibson had no marketing agreement with Solv-Ex and never indicated it was procuring such equipment. (To the contrary, since a pipeline was proposed for the near future, Gibson had already concluded a substantial investment in trucks was not prudent.)

34. During the December 3, 1996 conference call, Mr. Rendall also stated that "we have a $13 million contingency to keep to our original oil production schedule." He further stated, "…please remember that the successful operation of our plant in the first quarter is planned to bring in a revenue stream of $1 million per month, rising to $4 million by the third quarter." Also during the December j3, 1996 conference call, Mr. Rendall stated, "…we plan to establish continuous operation of three logwashers,

two of which will be installed in December of this year." Exs. 831, pp. 1, 2, 3; 30. This was materially false and misleading as the internal Solv-Ex objective as of December 1996, as communicated by Mr. Rendall to company personnel, was only to install one of the logwasher trains, and demonstrate that it could be operated to produce bitumen in some amount or separate some amount of bitumen from sand by the end of March 1997. Moreover, two weeks later in mid-December 1996, portions of only one logwasher train were on site. Ex. 30; Fox video testimony.

35. In spite of his statement in the December 3, 1996 conference call, Mr. Campbell first began negotiating an actual contract allowing Solv-Ex to sell filtered bitumen to Gibson in January or February of 1997.

36. On January 8, 1997, Solv-Ex concluded tests of the 4-inch filter on Lease 5 bitumen at the Albuquerque pilot plant; these tests actually revealed various operational problems and failed to produce bitumen meeting the .5% solids specifications. Exs. 111, App. B; 113.

37. In the January 10, 1997 conference call, Mr. Rendall stated Solv-Ex's objectives for 1997, among which were "establishing the capacity of one logwasher in the first quarter of 1997." Ex. 832, p. 1. He made his statement without disclosing the complete failure of the mini-model filter tests just two days before. Rendall also stated:

> Around the middle of February, when the plant is available for testing, we intend to test it with twelve test runs. We have

> defined the conditions of each test run. That would involve about 500 barrels a day initially, in February. Once we establish the conditions for continuous testing, we expect in March to be running at the rate of about 100,000 barrels a month.

Ex. 832, p.5.

38. In a January 10, 1997 conference call with investors, securities analysts and broker-dealers, Mr. Rendall reiterated that "[t]he full plant is expected to be completed around the middle of February for testing, and continuous production is planned for March." Ex. 31, p. 10.

39. In the January 21, 1997 press release, Solv-Ex stated that it is "well positioned to achieve its objectives…and is moving towards production of oil (bitumen) during the first quarter of 1997 from a plant currently under construction on its oil sands lease in Alberta." ex. 835, ¶¶ 7-8.

40. In the February 10, 1997 conference call, Mr. Rendall represented the status of the oil extraction plant in the following terms:

> Originally, we had planned to test the unit, extraction unit, which is in place, in February. We now have decided to move forward to the complete plant being available for shakedown and production in a continuous basis as a more appropriate way in which to handle this plant. The plant is a big plant, needs to be shaken down, and started up and not stopped. We

> have a team up there in training so that when the startup and shakedown occurs, we're ready for it. March for startup.

Ex. 839, p. 1 (¶ 10). Mr. Rendall further stated, "What we have to establish in the first quarter [is] that the equipment is lined up to produce the oil [and that] will produce a marketable oil. We are very confident the process works, and it works remarkably well. We just have to shake down the equipment to establish it." Id. at p. 5. This is a material misstatement since there was no factual basis from which Rendall could conclude the process worked at all at the production level much less "remarkably well." It is also inaccurate in that most of the full scale equipment had not even been installed, much less operated to actually produce a marketable product. Mr. Rendall was also aware that the filtration problems continued and no bitumen meeting Gibson standards had ever been produced from Lease 5.

41. In the February 25, 1997 conference call, Mr. Rendall voiced his opinion that "this thing will run immediately" and "[w]ithin a day I'll be producing good oil," but "it's not a fact until I do it." Ex. 842, p. 7 (¶ 5). Also, he reiterated the goal of "[m]arketable oil by the end of the first quarter." Id., at p. 2 (¶ 9). This hyperbole could be excused except that it fueled the unrealistic expectations created by Rendall's earlier misrepresentations.

42. In the March 6, 1997 press release, Solv-Es stated that it "expects to commence oil production form its first-stage plant in Alberta before the end of March 1997." Ex. 846, ¶ 1. According to the project

manager, Steve Lane, "all equipment required for primary extraction of heavy oil (bitumen) is in place and work is totally proceeding on schedule to complete final electrical, piping and instrument installations." Id., at ¶ 2. This is misleading as it fails to disclose this equipment was experimental and no proven product has even been produced.

43. On March 29, 1997, Solv-Ex personnel attempted the first test of the equipment at the Solv-Ex Lease 5 Alberta site. Ex. 111, App. F. At a very early point in the March 29, 1997 test of the plant, Solv-Ex personnel determined that modifications in the water circulation and clarification circuit at the Alberta plant would be needed to achieve continuous operations. Ex. 111, App. F. Moreover, as of March 29, 1997, no installation of automatic instrumentation to record temperature, steam pressure and flow rates during the bitumen extraction process had been completed so production scale operation was still purely theoretical.

44. During the March 29, 1997 test, settling and build-up of solids occurred in the pump box, a component of the logwasher train, in an amount significantly greater than anticipated. Ex. 111, App. F. Due to the build-up of the fine particle solids, the filters were "blinded" and the logwasher had to be shut down after just 12 hours of operation. Ex. 111, App. F; Fox video testimony. Messrs. Campbell and Rendall were both aware the filtration problem had forced the shutdown. Recognizing this would make all prior bitumen production predictions completely impossible, Mr. Campbell told Mr. Rendall the NASDAQ and others were expecting production by the end of March, so they better issue a statement.

After numerous conversations with Mr. Rendall, Mr. Campbell drafted a press release at 6:00 a.m. on March 31, 1997 and faxed it to NASDAQ. Solv-Ex announced that "bitumen production had commenced" at its Lease 5 oil plant. Ex. 35A. This was a material misstatement clearly designed to mislead investors.

45. In an April 7, 1997 conference call, Mr. Rendall stated, "...we have produced oil in a commercially-sized module on our lease in the Athabasca oil sands of Canada." He represented the plant as "operational." He concluded, "Our oil process works in a commercially-sized module." Ex. 851. This was a material misrepresentation of fact designed to mislead investors.

46. It was not coincidental that on April 15, 1997 Solv-Ex announced it had "placed" $22 million in debentures which could be converted into Solv-Ex common stock. Ex. 853.

47. Following the March 29, 1997 start-up of the Lease 5 logwasher, both Messrs. Campbell and Rendall knew Solv-Ex operated the logwasher only for an isolated test and demonstration runs of no more than six hours. Neither took any action to correct the overly optimistic predictions they had made with regard to the timing or amount of production from the Alberta plant.

48. Following several unsuccessful attempts during early April 1997, Solv-Ex personnel first obtained a measurable amount of filtered Solv-Ex bitumen at the Lease 5 plant using the 24-inch prototype Mott filter on April 21, 1997. Exs. 108, 110, 111; Fox video

testimony.

49. After two to three cycles of operation of the prototype plant at Least 5 on April 21, 1997, operational problems developed with the logwasher circuit which again required that the system be shut down. Ex. 111, p. 11.

50. The first successful filtration occurred on April 21, 1997, and the amount of filtered bitumen Solv-Ex produced through the use of the 24-inch prototype Mott filter was only two 55-gallon drums. Moreover, the production could not be duplicated. Ex. 110; Fox video testimony.

51. In the April 30, 1997 press release, Solv-Ex reported it was "pleased with the initial testing, the primary extraction circuit worked well in the commissioning process [and] that testing would now be focused on the bitumen cleaning system which follows primary extraction." Ex. 854, ¶ 4. It was also stated the quality of the bitumen produced in primary extraction to date is better than expected. The press release further stated that "we do not believe we will have difficulty in producing on a continuous basis bitumen which meets market specifications. Our objective is to...be in a continuous operation by the end of May." Ex. 36. There was no factual basis to support any of those statements, except perhaps that relating to the quality, as it does not attribute the "expectation" to any source. These are material misstatements of fact.

52. Solv-Ex was never able to sustain continuous operation of the logwasher or to produce oil at the Alberta plant.

53. Solv-Ex never finalized any marketing agreements with Gibson for any filtered bitumen product from Lease 5 and therefore had no reliable method to market filtered bitumen even if it had been able to produce it.

Minerals

54. In 1994, Solv-Ex announced it had discovered that it could produce bitumen from Athabasca tar sands by a process which did not use solvents and did not generate toxic tailings.

55. In a further effort to ameliorate the environmental impact of mining bitumen, Solv-Ex obtained more than 100 tons of toxic fine tailings (commonly known as sludge) generated by the nearby oil sands processing plant operated by Suncor. Ex. 776, p. 2. From 1992 through 1994, Solv-Ex conducted several laboratory and pilot plant tests on these tailings and discovered some potential to extract and produce minerals and synthetics from them and detoxify the tailings for acceptable land fill. Ex. 785, p. 4. Solv-Ex also conducted mineral tests on the fine clay derived from oil sands from Lease 5 for gold, titanium and other mineral extracts. Exs. 502-504, 525, 548-550, 729, 732.

56. In August 1993, Solv-Ex announced that the initial phase of testing and evaluation of its program for commercial recovery of metals had been completed by processing about 100 tons of Suncor pond sludge tailings.

57. Soon thereafter, Solv-Ex announced its ability to

produce a "unique" form of aluminum oxide (commonly called "alumina") from the oil sands clays. Exs. 11, 33. The alumina would be extracted as a by-product from the tailings produced from processing the bitumen. Solv-Ex touted this form of "co-production" as being both more environmentally friendly and more economically successful than existing methods of bitumen extraction. From at least 1994 to 1999, Solv-Ex made a concentrated effort to make a type of aluminum oxide that was suitable for making metallic aluminum.

58. On October 5, 1993, Solv-Ex announced that roasting of the double salts in the process of producing the alumina generated an intermediate product which had properties suitable for insulation. In January 1997, the company announced it had been issued a patent for this insulation including shaping it into rigid forms. Ex. 32. No market was developed and it was never produced.

59. By December 1994, Solv-Ex had completed the feasibility study that provided a complete technical and financial description of the project. Ex. 506. The feasibility study: (i) defined the design for a co-production facility on Lease 5 to produce 10,000 barrels per day of pipelineable crude oil ("PCO") and 64,000 tons per year of alumina to be custom smelted and sold as aluminum; (ii) provided detailed estimates of capital and operating costs for the facility (together with projected revenue streams); and (iii) provided a comprehensive analysis of the project as a whole to determine the amount of financing needed for the project. Ex. 506, pp. 1-3, 5-2. Solv-Ex estimated the capital cost of the oil extraction facility at $95 million and the mineral

processing plant at $25 million. Ex. 506, p.5-1.

60. The feasibility study stated that it would be subjected to a two-part technical and financial audit in early 1995. The Pace Consultants, Inc. ("Pace"), an independent consulting firm with expertise in hydrocarbon processing and marketing, was retained to review the bitumen extraction and PCO production sections of the planned plant. Ex. 508. Cumming Cockburn, Ltd. was retained to update its January 1994 financial and technical audit for the minerals processing portion of the co-production facility. Ex. 550.

61. Subsequent research further showed that basic potassium aluminum sulfate (BKAS") could be produced frothily residue tailings as yet another intermediate product in the production of alumina. Exs. 549, 589, 596, 602-603, 637A, 638. Solv-Ex compared, and attempted to market, its BKAS as similar to a naturally occurring mineral, Titanium Dioxide ("Ti02"), the "Rolls Royce" of paper coating and fillers. Solv-Ex renamed the synthetic mineral "Titanium Dioxide Substitute or TI02S."

62. Natural Titanium Dioxide displays superior optical qualities, and consequently sells for roughly $2,000 per ton, compared to much lower prices for other common pigments, such as calcined kaolin ($550 per ton) and precipitated calcium carbonate ("PCC") ($150-200 per ton). Ex. 52, pp. 5-16. Solv-Ex commissioned various tests to show this synthetic mineral had potential applications as a filler in the production of photocopy paper, glossy paper, ink, plastic and coatings. Exs. 653, 692, 699, 701-702.

63. In pursuit of other potential applications of Ti02S, Solv-Ex commissioned testing which resulted in a preliminary report from D.L. Laboratories ("D.L. Labs"), dated July 26, 1996. Solv-Ex, however, had great difficulty in producing sufficient quantities of Ti02S for testing. By September 1996, only minimal quantities of TI02S had been delivered for testing by D.L. Labs, for possible use as a paint additive. Exs. 60; 567. The first test by D.L. Labs showed that the small Ti02S sample delivered did not grind well enough to be acceptable. Ex. 567. The report of D.L. Labs' second test cited the determination that Ti02S "cannot be readily incorporated into [paint] coatings formulations." Ex. 60. D.L. Labs recommended substantial further study. Ex. 588, p. 4.

64. In June 1996, Solv-Ex also had Ti02S evaluated by Utility Development Corporation ("UDC") as a potential filler for plastics. UDC reported that the Solv-Ex product appeared to serve as a potentially acceptable filler in certain plastic application trials, but recommended different surface treatments so that the product could be a cost effective competitor. It also recommended that Solv-Ex evaluate a finer particle size. Exs. 46, 587.

65. In a September 5, 1996 conference call, Mr. Rendall stated that "[i]n terms of paint [Ti02S] meets the specifications. In the case of fillers for [plastics] resins, it also does." Ex. 816. Any reference to the UDC or D.L. Labs tests which did not support this conclusion was omitted.

66. Pilot plants to produce paper pigments typically cost several million dollars to construct, and must have a

capacity of approximately 250 liters. The purpose of the pilot plant is to produce tanker-truck-sized samples, each of some 15 to 20 tons in size, for field trials by paper manufacturers. Gann trial testimony. Solv-Ex attempted to scale up its production of Ti02S in its pilot plant in spring 1997 and to meet specific requirements for particle size. Ex. 72; Metcalf 195-96, 96-97. Solv-Ex was not successful in its attempts to produce Ti02S at the required particle size at the pilot plant level. Ex. 72; Metcalf I, 95-96.

67. As of fall 1996 and continuing to at least March 1997, Solv-Ex's Albuquerque pilot plant equipment was still only capable of making 50 to 100 pounds of Ti02S per day. Nielsen 304.

68. As reported by UDC and D.L. Labs, the Ti02S particles that Solv-Ex produced in its pilot plant reactors remained too large for its anticipated industrial applications. Metcalf I 112-113; Nielsen 160-161, 263. Solv-Ex's attempts to reduce the particle size Ti02S by grinding it with its own laboratory equipment proved unsatisfactory. Nielsen 160. Although grinding equipment was shown n flow sheets for the proposed minerals plant in Alberta, Solv-Ex never installed or tested the grinding equipment in its Albuquerque pilot plant. Nielsen 263, 315.

69. In a September 6, 1996 press release, Ex. 22, the company announced:

> Progress has been excellent in development of markets for the products which can be produced from the fine clays, particularly

- in view of continued testing of the new Solv-Ex cell for production of electrolytic aluminum and independent testing to date of a potassium-based synthetic mineral which appears quite suitable for the huge filler markets in paper, paint and plastics.

  Solv-Ex said that it continues to believe that the fine clays represent a source of minerals and metals which greatly exceed the value of the oil contained in the oil sands and that the tailings can become a tremendous asset rather than a major item of environmental controversy. It has been publicly estimated that more than a billion tons of the tailings, which many observers consider to be highly toxic, will be in place by the year 2010, much of which is in close proximity to the Athabasca River. (Emphasis added.)

At the time of this press release, there was no factual basis to conclude TI02S was "quite suitable for the huge filler markets in paper, paint, and plastics." Mr. Campbell prepared the press release and knew of no data to support these conclusions. Even if he quoted Mr. Rendall, which he gave no indication of, a corporate officer should not be allowed to publish material misrepresentations without any legal responsibility.

70. In May 1996, a Solv-Ex consultant, Dr. George Ionides, issued the "Papermaking Pigments Market Study" to define potential markets for papermaking pigments in the regions of North America which could be economically served by the Solv-Ex mineral

pigment production plant in Alberta. After interviews with four senior paper/pigment industry technical experts, Dr. Ionides concluded that with its "anticipated" properties Ti02S could sell in the range of $600-$800 per ton. Exs. 657, p. 5-16; 662, pp 1-2. Mr. Rendall testified it could be produced for about $200 per ton.

71. Dr. Ionides arranged for Ti02S to be tested in papermaking trials by William Forester at Western Michigan University ("WMU"). Solv-Ex tested 400 to 450 pounds of Ti02S as a paper filler in formulations for two types of paper on October 2, and 3, 1996 (the "October trial"). Because the amount of Ti02S retained in the uncoated wood free paper had not reached Forester's target level, the WMU tests were inconclusive, and Dr. Ionides requested that WMU re-run that trial according to instructions provided by him. Ex. 54. Subsequent tests were scheduled for November.

72. During the subsequent November trial, because of Ti02S the sheet strength suffered and the paper was very "soft." Ex. 56. The lack of strength was reflected in some breaks in the paper made with the Ti02S filler. Forester 22. During the November trial, the poor retention of the Ti02S also caused a large build-up of the Ti02S filler on the wet end of the paper machine and thus excessive foam. Ex. 56. This prevented the machines from running efficiently.

73. After the November trial, Mr. Forester recommended further testing to determine how to regain the paper strength lost from the addition of the Ti02S. Ex. 56. Mr. Rendall was aware of Mr. Forester's November

4, 1996 recommendations, but did not publicize them or the results of the tests.

74. On or about November 20, 1996, Solv-Ex and Raisio Chemicals ("Rasio"), an international distributor of chemicals, entered into a letter of intent for the purposes of conducting additional tests on Ti02S. Ex. 698, p. 1. The alliance between Solv-Ex and Rasio was announced in Solv-Ex's November 27, 1996 press release. Ex. 830, ¶ 1. The press release stated that "the alliance with Raisio contemplated an aggressive testing schedule which could accelerate plans for commercial production if testing proceeds in line with expectations." Ex. 29. The results of the Forester tests were not disclosed and this was a material omission.

75. At the end of November, Ti02S had not been successfully tested for any commercial application. Nonetheless, in a December 3, 1996 conference call, Mr. Rendall stated:

> (Ti02S) has similar characteristics to titanium dioxide pigment, including its light-scattering properties.
>
> With a view to securing the highest value for this product (Ti02S) which is in coatings for high quality paper, the company has embarked on an aggressive market-driven program with Raisio Chemicals. Thousands of pounds of product from our test center in Albuquerque will be used in various coating formulations in Raisio's multimillion-dollar facilities to produce

> high-quality paper in the first quarter of 1997. Based on successfully reaching our objectives, the second quarter will involve paper mills, and the third quarter should see hundreds of tons of product from Lease 5 commercially used to secure long-term contracts for continuous production in the fourth quarter of 1997.

Ex. 831, p. 1 (¶¶ 7-8) (emphasis added). This statement was completely hypothetical and overly optimistic since the "Albuquerque center" had not produced thousands much less any significant quantity of pounds of product. Nor was it disclosed that all tests of Ti02S as a paper additive had failed to produce a satisfactory formula.

76. As of January 1997, Raisio merely had performed an "initial evaluation" of but three minute 400-gram samples of Ti-2S as an additive in paper coatings and the Albuquerque test plant clearly did not and could not produce the "thousands of pounds of product" Mr. Rendall had represented would be tested in the first quarter of 1997. Ex. 58.

77. Solv-Ex never determined a filler or coating application to which Ti02S should be targeted. In the absence of such a target Solv-Ex could not determine what specifications Ti02S would have to meet, much less determine how to achieve such specifications.

78. Solv-Ex never even implemented a reliable cost-effective means of reducing the particle size of Ti02S to meet the requirements for either paper or paint applications. Exs. 61, 63, 590, 604, 606.

79. In the January 31, 1997 press release, Mr. Rendall stated that Solv-Ex's "target is to be in construction of the minerals extraction plant during the first half of 1997 and achieve production before the end of the year." Ex. 837, ¶ 4.

80. In the February 10, 1997 conference call, Mr. Rendall disclosed the plans for production of TI02S at the rate of one ton per month at the Albuquerque pilot plant for testing from April or May, 1997. Ex. 839, p.6 (¶ 3). There was no factual basis that could legitimately support such plans and Mr. Rendall's excessive optimism was intentionally misleading.

81. Solv-Ex's pilot plant never produced a large enough quantity of Ti02S to conduct the necessary production-scale tests for any commercial application. Nielsen 85-86, 211; Metcalf II 185-186.

New Method of Aluminum Production

82. In late 1994, Solv-Ex tested a prototype cell to manufacture industrial grade aluminum from the alumina extracted from the Athabasca clay. The test proved the process was theoretically possible and Solv-Ex decided to upscale to the larger lab size version.

83. In the February 21, 1995 press release, Solv-Ex announced that Pat Davey, a longtime international consultant for aluminum projects of Kaiser Aluminum Corporation, had joined the board of directors to head development of the production of aluminum from the alumina produced by Solv-Ex at the "co-production plant" in Alberta, Canada. Ex.

764. In the press release Mr. Davey is quoted as saying:

> The alumina produced using the Solv-Ex technology is extremely high quality and can offer significant opportunities, as well as production efficiencies and environmental benefits, for existing smelters. The possibility of further expanding our horizons through use of this alumina in a new type of electrolytic cell is particularly exciting...

In that press release Solv-Ex also disclosed:

> For about a year, work has been under way at Solv-Ex on new cell design and technology, which has been demonstrated at laboratory scale. Patent applications have been filed, and Solv-Ex plans to build and operate a cell capable of producing one to two pounds of aluminum per hour at its Albuquerque plant.

84. In a presentation at a professional conference held on April 3, 1995, Solv-Ex described the general process of how alumina could be produced from clays contained in the Athabasca oil sands. Ex. 765. The proposed 10,000 barrel per day Solv-Ex oil facility was to produce between 64,000 to 100,000 tons pre year of such alumina. Id., at p. 3, slide 23 (at p. 588031).

85. In a May 8, 1995 conference call, Mr. Rendall stated:

> [W]hat I'm doing now is lining up the pilot plant here to produce one to 200 pounds of alumina, and one to 200 pounds an hour of other products. So that I've got it market in tonnage, so that when I kick off the sludge project at the end of this year, I have sold everything, that this solves cash flow problems.

Ex. 767, p.6.

86. In the June 5, 1995 conference call, Mr. Rendall stated that Solv-Ex is on track for the alumina project and that the production goals remain unchanged. Ex. 771, p. 4.

87. In the August 1, 1995 Management Letter to Shareholders, Ex. 776, p.2, Mr. Rendall summarized the projected plan for the Synthetic Minerals Plant:

- Up to 100,000 tons per year of alumina products
- Up to 200,000 tons per year of synthetic minerals from waste
- Capital estimated at $20 million for initial production - expansion at $15 million
- Marketing for synthetic minerals by ITC Corp.
- Cash flow in early 1996
- Complete review and audit of feasibility by Cumming Cockburn, Ltd.
- Projected operating costs of $25 per ton for all products
- Permits expected in September
- Experienced project management in place

88. On August 2, 1995, the Solv-Ex aluminum team completed the "Start-up and Operating Procedures" for a "2700 Ampere Pilot Cell." Ex. 755. The overall purpose of the test was to determine whether Solv-Ex alumina (to be produced from actual Lease 5 tailings) could produce metallic aluminum at 750°C in a more efficient vertical configuration of the anodes and at approximately 200°C lower than the temperature needed in existing commercial cells. If successful, both of these would be major breakthroughs in the production of aluminum since a large part of the cost of production derives from the dual costs of anode replacement and electricity.

89. In the August 28, 1995 press release, Solv-Ex announced that it had entered into a memorandum of understanding with Glencore, Ltd. (the world's largest trader of metallurgical grade alumina) for initial marketing of metallurgical grade alumina to be produced from oil sand tailings on Solv-Ex Lease 5. The announced agreement contemplated a $10 million advance to assist in project financing. Ex. 778, ¶ 1. However, no advance was ever made as definitive agreements were not reached by the October 31, 1995 deadline. Ex. 783, ¶ 2. This was never publicized by Solv-Ex.

90. On or about December 8, 1995, the Solv-Ex aluminum cell team attempted to start the prototype electrolytic cell, but they were not able to reach a high enough temperature with internal heaters to process the Solv-Ex alumina and cancelled the experiment after 48 h ours. Vondrak Ex. 4, Ex. 1082.

91. The stated objectives of the test were:

i. To verify that electrolysis of an Alumina suspension in the alumina saturated low-temperature eutectic NaF-A1F3 electrolyte is practicable on a large scale.

ii. To operate the Pilot Cell to develop operating parameters and procedures.

iii. To determine the physical and electrical characteristics of the electrolyte.

iv. To determine the effect of electrolyte composition and contained alumina variations on cell operation.

v. To determine material losses and air pollution control requirements.

vi. To determine production efficiencies.

vii. To verify cell and electrode construction, heat balance and electrode life.

viii. To develop a nonconsumable anode.

Ex. 755, p. 1. While the team arguably had some very limited success on (i) and (ii), the remaining goals were not even partially met. Vondrak pp. 86-91.

92. In the 1995 Form 10-K, Solv-Ex announced that:

> Work performed...at (its) Pilot Plant has resulted in production of alumina which

> meets specifications for metallurgical grade alumina ... through standard ... processes. Evaluation of the Company's process by both independent consultant and sources with the alumina/aluminum industry has confirmed the ability to achieve these results within projected operating costs.
>
> ****
>
> Although considerable work must be performed to determine total feasibility of the process (for producing aluminum meta [as opposed to alumina]), the results of testing to date have been very encouraging and the Company has applied for patents with respect to the new process.

Ex. 863 at 10 ¶ 5; 13 ¶ 3 (emphasis added). These statements were designed to mislead investors as no quantity of alumina was, or could be, produced "which meets specifications for metallurgical grade" and certainly not through anything approaching "standard processes." Nor was there any evidence either the Company or an independent consultant had confirmed this could be done at competitive costs.

93. On January 18-19, 1996, Solv-Ex again attempted to operate the prototype electrolytic cell. Solv-Ex personnel began heating the cell on January 18, 1996, and the heating system again failed. Ex. 75. Solv-Ex shut down the cell after it began leaking electrolyte a second time, the cell experienced arcing (electrical shortening through sparks), and the cell temperature dropped below the required operating level. Vondrak p. 65; Ex. 75, pp. 533002, 533004-5;

Kennedy p. 42.

94. Solv-Ex shut down the operation to prevent the cell from damaging itself further through the arcing and cooling. Kennedy p. 45. The copper anodes used in the prototype cell were destroyed during the test. Ex. 76, pp. 534002, 534004, 534008; Kennedy p. 86. At the time of the test and during the autopsy of the cell, Solv-Ex personnel were unable to objectively confirm that the prototype electrolytic cell actually produced any measurable quantity of aluminum during the test. Vondrak pp. 90-91; Exs. 76, pp. 534012-13; 757 Strahl letter. In short, the test was an unmitigated failure.

95. The summary section of Solv-Ex's internal autopsy report on the cell test states that the "[a]utopsy of the 2700 Ampere Pilot Cell indicated serious problems in the materials used and construction of the cell." Ex. 76, p. 534002. A letter attached to the internal autopsy report states that "[t]he existing cell design served its purpose in showing how difficult it is to design a new process without full appreciating its complexity. We have learned that both the materials of construction used and the existing design are incapable of sustained operation." Ex. 76, p. 534010.

96. The outside expert, Dr. Erwin Strahl, retained by Solv-Ex to create and control the electrolyte bath in the cell, concluded "as a result of our testing to date and the autopsy observations, some very fundamental problems need to be readdressed." Ex. 757.

97. Had the test of the prototype 2700 ampere electrolytic cell been a success, the process engineer at Solv-Ex would then have recommended the

building and testing of a prototype 10,000 ampere cell. Vondrak pp. 94-95. Rather than advancing to the 10,000 ampere cell, however, after the test of the prototype 2700 ampere electrolytic cell, the process engineer and chemical engineer jointly proposed reducing laboratory tests on the cell back to laboratory bench scale where they had experienced some limited success in 1995. Vondrak p. 91; Ex. 76, p. 534013.

98. On January 23, 1996, Solv-Ex issued a press release authored by Herbert Campbell. (Ex. 11). It says *inter alia*:

> Solv-Ex has successfully completed initial testing of its new aluminum reduction technology and prototype electronic cell, Solv-Ex Chairman and Chief Executive Officer John S. Rendall announced today. The Solv-Ex cell was operated at a temperature of 750 degrees centigrade, which is more than 200 degrees centigrade lower than used in existing aluminum smelters. The test used no consumable electrodes and a unique grade of highly porous alumina which is produced at the company's test facility in Albuquerque.

These statements are false and misleading. The December 1995 and January 1996 testing could not be considered "successful" by any accepted definition of the term and Mr. Rendall knew facts directly contradicting such an assessment. The statement is also misleading in referring to the lower temperature because the process produced no measurable quantity of aluminum and the

"nonconsumable electrodes" were in fact consumed. Based on the technical nature of these tests and Mr. Campbell's attribution of the conclusions to Rendall, Campbell may be excused from responsibility for propagating these falsehoods. (Tr. 932-7; 950). However, at least by the following day, Campbell became aware the cell had sprung a leak during the test and had to be shut down. (Tr. 956-8) Following the autopsy of the cell, neither Mr. Campbell nor Mr. Rendall took any action to correct the misrepresentation of success created by the January 23, 1996 press release.

99. Solv-Ex issued another press release on February 26, 1996 stating, among other things, that "[f]inally, our new cell for commercial operations (which will now be proven in the field) involves panels of about 6'0" x 6'0" compared with the approximate 2'0" x 2'0" panels we are currently working with in Albuquerque. The scale up factors are quite reasonable." Ex. 13, p. 3. this is a complete distortion of the actual facts as the cell tests were in reality being scaled back to bench scale and not up to production scale. This document was apparently drafted by Mr. Butler and revised by Mr. Campbell.

100. Solv-Ex then issued a March 11, 1996 press release stating, "The primary mineral of interest in the clays is alumina, and Solv-Ex announced in January 1996 that it had successfully tested a new design of an electrolytic cell to produce aluminum metal from the alumina." Ex. 14 I (emphasis added). BY any objectively reasonable definition of "successful," this was completely untrue.

101. In an August 26, 1996 letter to Solv-Ex shareholders,

Mr. Rendall wrote that "[w]e have made further progress since the cell was first tested successfully in January of this year and we see no 'show-stoppers' in proceeding to installation of one or more commercial cells as soon as the mineral extraction technology has been demonstrated on a commercial basis." Ex. 20.

102. In the September 5, 1996 conference call, Mr. Rendall stated that "[w]e are getting the aluminum cell working continuously. We have proven out a dimensionally stable anode. We intend next year to have a prototype working to put up a commercial plant." Ex. 816, p.6 (¶ 12). An "aluminum cell working continuously" never existed and this is a total fabrication intended to mislead investors.

103. In the September 10, 1996 press release, Mr. Rendall stated that Solv-Ex received a patent for the new electrolytic cell first "successfully" tested in January 1996. Ex. 818, ¶ 1. He also stated that Solv-Ex had made "significant headway in confirming the ability to utilize nonconsumable anodes on a consistent basis." Id., at ¶ 2. There is no believable evidence of the ability of Solv-Ex to create test or use nonconsumable anodes.

104. In the December 3, 1996 conference call, Mr. Rendall stated, "We have further developed an aluminum cell to the stage of continuous production with a nonconsumable anode at bench scale." Ex. 831, p.2. This was also a material misstatement of fact.

105. Solv-Ex never produced or successfully developed a nonconsumable anode for production of metallic aluminum. Kennedy pp. 91-92.

106. Rendall, Campbell and Solv-Ex never disclosed to the investing public that after the test of the prototype 2700 ampere cell, Solv-Ex was forced to scale back its testing to laboratory scale.

107. Solv-Ex's 10-K and amended 10-K for the period ending June 30, 1996 contained misleading statements regarding the status of Solv-Ex's aluminum reduction cell testing and technology. Exs. 40, 40a.

Summary

108. John Rendall had a dream to revolutionize the two industries in which he had worked: bitumen extraction and aluminum production. That dream blinded him to the practical scientific impediments to the fulfillment of that dream. When confronted with negative results, "he would have a tendency to ignore that information or work around it or repeat the experiment over and over and over again." Metcalf p. 221.

109. Collectively read, the press releases, shareholder letters, and other statements, which Defendants disseminated on a virtually weekly basis, created the false impression that Solv-Ex was on the verge of generating revenues from the alumina, Ti02, and bitumen production. In fact, the evidence demonstrates that at the time many of these statements were disseminated, Solv-Ex was in various stages of research and development with respect to the three technologies, but that commercial exploitation of any of them was never more than a theoretical possibility, and this was never disclosed.

Conclusions of Law

1. At all times relevant to the complaint, Solv-Ex was registered with the Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act").

2. Solv-Ex was therefore required to file periodic reports with the Commission pursuant to Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder.

3. In enforcement actions, the Commission "appears…not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the securities laws." SEC v. Management Dynamics, Inc., 515 F.2d 801, 808 (2nd Cir. 1975).

4. This enforcement action involves a pattern of statements issued by a public company and its two key executive officers that created the misleading impression that each of three revolutionary new technologies being developed by the company was a virtually unqualified success. The pattern of these statements created in the mind of any reasonable investor the expectation that commercial exploitation of the technologies, each with substantial revenue stream, was not only assured, but would occur in the very near future.

5. Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. 240.10b-5] and Section 17(a) of the Securities Act of 1933

("Securities Act") [15 U.S.C. § 77q(a)] prohibit persons and entities from, among other things, making material misstatements or omitting to state material facts in connection with the purchase or sale of any security. Clegg v. Conk, 507 F.2d 1351 (10th Cir. 1974); see generally Thomas Lee Hayen, 2 THE LAW OF SECURITIES REGULATION § 13.2 p. 461 (3rd ed.).

6. A statement is material if a reasonable investor would consider it important in determining whether to buy or sell a stock. Grossman v. Novell, Inc., 120 F.3d 1112, 1119 (10th Cir. 1997). "Material facts include those 'which affect the probable future of the company and those which may affect the desire of investors to buy, sell or hold the company's securities.'" SEC v. Mayhew, 121 F.3d 44, 52 (2nd Cir. 1997) (quoting SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2nd Cir. 1968)); See also Folger Adam Co. v. PMI Indus., Inc., 938 F.2d 1529 (2nd Cir.), cert. denied, 502 U.S. 983 (1991). An omission is material if there is a "substantial likelihood" that either "the omitted fact would have assumed actual significance" in the investment decision or "the omitted face would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." TSC Indus., Inc. v. Northway, Inc., 426 U.S> 438, 449 (1976). Misrepresentations and omissions concerning the status and success of the development of commercially feasible core technologies for a development stage company having no revenue and no products are facially material. See Kaplan v. Rose, 49 F.3d 1363, 1374 (9th Cir. 1994) (misleading to use term "successful" to describe test results generally inconsistent with

success); see also SEC v. International Chem. Dev. Corp., 469 F.2d 20, 26 (10th Cir. 1972) (material omission not disclosing that patents were not proven commercially feasible).

7. When management and directors are parties to a securities fraud, the test as to causation is whether the facts not disclosed or disclosed in a misleading fashion significantly altered the total mix of information available. IIT, an Int'l Inv. Trust v. Cornfield, 619 F.2d 909 (2nd Cir. 1980). The false statements by the Defendants and their failure to disclose the full test results and reports of their consultants significantly altered the total mix. The Defendants' repeated issuance of press releases, which stated only the positive aspects of such tests, misled the investing public; especially because no corrective information was never disseminated.

8. "The misleading, misrepresented or untruthful character of the release may appear from the nature of the statement considered above, or, when the facts are fully disclosed, from the half truths, omissions or absence of full candor concealed therein." Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90, 97 (10th Cir. 1971); Gilbert v. Nixon, 429 F.2d 348, 356 (10th Cir. 1970); Rogen v. Ilikon Corp., 361 F.2d 260 (1st Cir. 1966).

9. Scienter connotes an intent to deceive, manipulate or defraud. City of Philadelphia v. Fleming Cos., 269 F.2d 1245 (10th Cir. 2001); "One is not to be held liable…because of his misleading misrepresentation or omission of material fact, the truth of the matter being unknown to the purchaser, if the party responsible for the misrepresentation or omission

sustained the burden of proving that he did not know, and in the exercise of reasonable care could not have known that it was a misrepresentation or omission." Clegg v. Conk, 507 F.2d at 1358. However, "there is a strong inference of scienter when defendants publish a statement known to be false or so contrary to available information as to suggest fraud." Florida State Bd. of Admin. v. Green Tree, 270 F.3d 645, 665 (8th Cir. 2001). When a group of inside officials contributes to documents such as annual reports and press releases, each must assume responsibility for material misstatements. In re Gleufield, Inc., 60 F.3d 591, 593 (9th Cir. 1995) (per Kelly, J.); Holtman v. Aura Sys., 844 F. Supp. 549 (C.D. Cal. 1993). See F.F. 92. The statements of corporate officials are of particular importance to investors; the investing public "justifiably places heavy reliance on the statements and opinions of corporate insiders." In re Apple Computer Sec. Litig, 886 F.2d 1109, 1116 (9th Cir. 1989). This would seem especially applicable to the officers of Solv-Ex since Campbell, Rendall, and, to a much lesser extent Butler, were responsible for the constant disclosure of all information to the financial markets. F.F. 39, 42, 51, 100.

10. Mr. Rendall made several intentional misstatements of material fact. See F.F. 25, 32, 34, 40, 44, 45, 65, 75, 98, 103, 104.

11. Mr. Campbell also intentionally made several misstatements of material fact. See F.F. 28, 33, 44, 92, 99.

12. A duty to disclose technical or developmental problems with a produce may arise where a company makes strongly optimistic or concrete statements

about that product that are in stark contrast to its internal reports. Glassman v. Computervision Corp., 90 F.3d 617, 635 (1st Cir. 1996); Kaplan, 49 F.3d at 1374 (defendant's use of term "successfully" to describe test results was inconsistent with common understanding of the term without more information). The duty to speak the full truth thus arises when Defendants make affirmative representations. Rubinstein v. Collins, 20 F.3d 160, 170 (5th Cir. 1994); Hadsell v. Hoover, 484 F.2d 123 (10th Cir. 1973); Mitchell v. Texas Gulf Sulphur Co., 446 F.2d at 100.

13. Mr. Rendall omitted material facts in several instances in which he calculated the revelation of the whole truth would negatively impact Solv-Ex in the investment markets. See F.F. 26, 28, 37, 40, 74, 75, 98.

14. Mr. Campbell also omitted material facts when he calculated the revelation of the whole truth would negatively impact Solv-Ex in the financial markets. See F.F. 26, 28.

15. Representations pertaining to future events can be the basis of fraud when the defendant knows there is no reasonable factual basis for the representations or the speaker knows of undisclosed facts tending to seriously undermine the accuracy of the statement. In re HealthCare Compare Secur. Litig., 75 F.3d 276 (7th Cir. 1996); Rubinstein v. Collins, 20 F.3d at 166; In re VeriFone Secur. Litig. 11 F.3d 865, 870 (9th Cir. 1993); Bloomenthal and Wolff, 3D SECURITIES AND FEDERAL CORPORATE LAW § 20:4 p. 20-5 (1999).

16. Mr. Rendall's predictions as to future events were material misstatements of fact in that they were made without any factual support and/or in the face of contradictory and undisclosed factual evidence. See F.F. 25, 32, 34, 40, 75, 80.

17. Mr. Campbell's prediction of future events was a material misstatement of fact made without factual support and/or in the face of contradictory and undisclosed factual evidence. See F.F. 28.

18. John Rendall was vested with the power to direct and control, and did so, all aspects of Solv-Ex's business and was therefore responsible for Solv-Ex's misleading and incorrect statements in the official filings. As a control person of Solv-Ex pursuant to Section 20(a) of the Exchange Act, Mr. Rendall is directly liable for the company's reporting violations under Section 13(a0) and the rules thereunder. See Lanza v. Drexel & Co., 479 F.2d 1277, 1299 (2nd Cir. 973) (persons who have actual authority to direct the activities of the primary wrongdoer and have culpable participation in the activities are control persons within the meaning of Section 20(a)). See also Arthur Children's Trust v. Keim, 994 F.2d 1390, 1396-97 (9th Cir. 1993) (members of management committee were control persons because they made major business decisions affecting the venture).

19. Herbert Campbell was also a control person and had access to all of the negative tests and consultants' caveats which he chose to largely ignore in drafting the press releases which created a misleadingly optimistic picture of the prospects for each of the three Solv-Ex technologies. See Mitchell v. Texas Gulf Sulphur Co., 446 F.2d at 90.

20. Mr. Campbell was aware of facts from which he knew or should have known the prototype electrolytic cell leaded during the January 18, 1996 test, and was not the "success" he claimed in the January 23 and February 26, 1996 press releases. United States v. Schaefer, 299 F.2d 625 (7th Cir. 1962) (willful ignorance unavailing when others relying on representations of fact). See F.F. 98. Mr. Campbell knew or should have known that the information in Solv-Ex's 10-K filing was false or misleading. United States v. Benjamin, 328 F.2d 859, 861 (2d Cir. 1964) (corporate attorney cannot deliberately close his eyes and recklessly state as facts things he was ignorant of). See also Matter of Edward F. Duffy, 1995 WL 786625 (SEC 1995) (holding corporate attorney responsible for corporate press releases and securities filings he participated in). F.F. 92, 99. Even had his role at Solv-Ex been limited to that of corporate counsel, however, Mr. Campbell's conduct would be recklessly violative of the federal securities laws in that he both knew and was reckless in failure to verify erroneous factual statements he drafted. Rubin v. Schottenstein, Zox & Dunn, 143 F. 3d 263, 267 (6th Cir. 1998) ("[T]here is nothing special about [the defendant's] status as an attorney that negates his Rule 10b-5 duty to disclose, a duty that ordinarily would devolve under Rule 10b-5 upon a third party under these circumstances... An accountant or lawyer, for instance, who prepares a dishonest statement is a primary participant in a violation.") (citing SEC v. Coffey, 493 F.2d 1304, 1315 (6th Cir. 1974)). "Recklessness," defined as conduct that is an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either

known to the defendant or is so obvious that the actor must have been aware of it, can satisfy the scienter requirement for section 10(b), Securities Exchange Act of 1934." City of Philadelphia, 264 F.3d at 1258.

21. Solv-Ex, Rendall, and Campbell violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Section 17(a) of the Securities Act of 1933.

22. The European "trading program" was never implemented and therefore the restricted stock was never issued, thus no SEC reporting requirements were triggered.

23. Defendants rely on the "bespeaks caution" doctrine to shield their public statements. The "bespeaks caution" doctrine should be applied very carefully since it provides an incentive to misrepresent the truth. In re Donald J. Trump Casino Sec. Litig. - Taj Mahal Litig., 7 F.3d 357, 371 (3rd Cir. 1993). The cautionary statements in the Solv-Ex filings do not counterbalance the glowing projections in the Defendants' press releases and broker conferences. See Whirlpool Fin. Corp. v. GN Holdings, Inc., 873 F. Supp. 111, 123-24 (Non verbal response)..D. Ill. 1995); In re Colonial Ltd. Partnership Litig., 854 F. Supp. 64, 92-3 (D. Conn. 1994); In re First Am. Center Sec. Litig., 807 F. Supp. 326 (S.D.N.Y. 1992)

24. There is a reasonable likelihood that the Defendants will engage in future violations unless enjoined.

All tendered Findings and Conclusions not incorporated herein are deemed Denied.

DATED at Albuquerque this 24th day of September, 2003.

By: s/Bruce D. Black
Bruce D. Black
United States District Judge

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EXHIBIT A 3

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

vs.

SOLV-EX CORPORATION,

Defendant,

and

JOHN S. RENDALL and HERBERT M. CAMPBELL,

Defendants-Appellants.

No. 00-2339
(D.C. No. CIV-98-860-BB)
(D.N.M.)

FILED
United States Court of Appeals
Tenth Circuit

April 15, 2004

PATRICK FISHER
Clerk

ORDER AND JUDGMENT

Before **HENRY, PORFILIO,** and **MURPHY,** Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

In this appeal, two officers of a start-up corporation, each now proceeding pro se, challenge the district court's determination that they committed securities fraud through a series of materially misleading public statements.[6] The Securities and Exchange Commission commenced this enforcement action against Solv-Ex Corporation, its CEO John Rendall, and its senior vice president and general counsel Herb Campbell, for alleged violations of § 17(a) of the Securities Act of 1933, § 10(b) and § 13(a) of the Securities and Exchange Act of 1934, and the rules promulgated under those Acts.[7] The SEC contended that,

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6 After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

7 Section 10(b) of the Exchange Act (15.U.S.C. SYMBOL 167 \f "Times New Roman" \s 11 78j(b)) and SYMBOL 167 \f "Times New Roman" \s 11 17(a) of the Securities Act (15 U.S.C. SYMBOL 167 \f "Times New Roman" \s 11 77q(a)) are general fraud provisions. Together with Rule 10b-5 (17 C.F.R. SYMBOL 167 \f "Times New Roman" \s 11 240.10b-5), they make it unlawful for a person or entity, in connection with the purchase or sale of a security, to employ any device, scheme, or artifice to defraud, to make an untrue statement of material fact, or to omit a material fact that is necessary to make the statement made, in light of the circumstances under which it was made, not misleading. Section 13(a) of the Exchange Act (15 U.S.C. SYMBOL 167 \f "Times New Roman" \s 11 78m(a)) requires the issuer of a security to file annual and quarterly reports with the SEC, and Rule 12b-20 (17 C.F.R. SYMBOL 167 \f "Times New Roman" \s 11 240.12b-20) provides that required filings with the SEC must include "such further material information, f any, as may be necessary to make the required statements, in light of the circumstances under which they are made[,] not misleading."

from January 1995 through April 1997, defendants issued a series of public statements in press releases, in letters to shareholders, in conference calls with investors, brokers, and security analysts, and in filings with the SEC, that created the misleading impression that each of three technologies being developed by Solv-Ex was an unqualified success. The SEC asserted that "[t]he pattern of these statements created in the mind of any reasonable investor the expectation that commercial exploitation of the technologies, each with an attendant substantial revenue stream, was not only assured, but would occur in the very near future." R. Vol. IV, Doc. 90 at 1.

Following a bench trial, the district court issued a lengthy decision finding that Rendall and Campbell had made material misrepresentations and/or omissions in public statements and in filings with the SEC. The court imposed first-tier civil penalties of $5,000 against each of them and permanently enjoined them from future violations of § 17(a), § 10(b), and § 13(a). This appeal followed.

In an order issued August 4, 2003, this court addressed legal issues relating to the elements of the SEC's case and to the district court's evidentiary rulings, but reserved ruling on other issues pending a limited remand to the district court for further factual findings. The district court issued very detailed and comprehensive amended findings of fact and conclusions of law on September 24, 2003, which it certified to this court as a supplemental record. The parties then filed supplemental briefs addressing the district court's amended findings and conclusions.

We review the district court's findings of fact for clear error, giving "due regard...to the opportunity of the trial court to judge the credibility of witnesses." Fed. R. Civ. P. 52(a). "[R]eview under the 'clearly erroneous' standard is

significantly deferential." *Concrete Pipe & Prods. of Cal., Inc., v. Constr. Laborers Pension Trust of S. Cal.*, 508 U.S. 602, 623 (1993). Accordingly, "[w]e will not disturb the district court's findings of fact unless, following a review of the entire evidence, we are left with a definite and firm conviction that a mistake has been committed." *Davey v. Lockheed Martin Corp.*, 301 F.3d 1204, 1216 (10th Cir. 2002) (quotation omitted). Whether Campbell and/or Rendall made misrepresentations or omissions that were material, and whether they did so with the requisite scienter, are both "fact-specific issues." *Schneider v. Vennard (In re Apple Computer Sec. Litig.)*, 886 F.2d 1109, 1113 (9th Cir. 1989). We review the district court's legal conclusions de novo. *Nieto v. Kapoor*, 268 F.3d 1208, 1217 (10th Cir. 2001). Finally, we review the district court's decision to grant injunctive relief for an abuse of discretion. *See SEC v. Pros Int'l, Inc.*, 994 F.2d 767, 769 (10th Cir. 1993).

In addition to the pertinent law, we have carefully reviewed the district court's amended facts and conclusions, the record before us, and all the parties' briefs. Our review establishes that the district court did not err in finding that Rendall and Campbell made public statements that were materially misleading because they contained material misrepresentations and/or material omissions, and that defendants did so with the requisite scienter. Likewise, the district court did not err in finding that Rendall and Campbell made similarly misleading statements in reports they filed with the SEC. Nor did the district court abuse its discretion in determining, based on all the circumstances, that Rendall and Campbell should be enjoined from future securities violations in addition to being fined for their past violations.

We therefore AFFIRM the judgment of the district court for substantially the reasons set forth in its detailed and comprehensive amended findings of fact and conclusions of

law issued September 24, 2003. Rendall's motion to reconsider our decision not to hear oral argument in this appeal is DENIED. Rendall's motion to require the SEC to file all the trial exhibits of record is DENIED; his amended motion is GRANTED to the extent that it seeks permission to file Exhibit Nos. 20, 25, 885, 886, 887, and 1103 as an additional addendum to his brief.

Entered for the Court

Robert H. Henry
Circuit Judge

EXHIBIT A 4

F I L E D
United States District Court
Albuquerque, New Mexico

May 16, 2000 16:47

s/Robert M. March
Clerk

US District Court
District of New Mexico
Digital File Stamp

Case:	**98cv00860**
Title	**Securities and Exch. v. Solv-Ex Corporation et al.**
Document Type	**Judgment**
Document No.	**127**
Description	**JUDGMENT by Judge Bruce D. Black that Defendants are permanently restrained & enjoined from violation of sections set out; that Rendall and Campbell pay civil penalties of $5,000 each to SEC**

Total Pages	**4**
Exhibits/ Attachment	**0**
Court Signature	**67 27 b6 77 e4 b8 66 63 ef 5a 22 45 f7 3a f6 c5 27 4c 95 48 bd 84 81 44 f3 cb b9 1d b7 dc 1b aa 1e 44 de 6b 0b 25 ba 8d b1 5e a8 33 32 da 48 38 21 78 24 b9 5b b8 34 a2 8f d9 c3 6d 8f 86 51 f3**

This document constitutes an official stamp of the Court and, if attached to the document identified above, serves as an endorsed copy of the pleading. It may be used in lieu of the court's mechanical file stamp for the named document only, and misuse will be treated the same as misuse of the Court's official mechanical file stamp. The Court's digital signature is a verifiable mathematical computation unique to the filed documents and the Court's private encryption key. this signature assures that any change can be detected.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs. **No. CIV 98-860 BB/RLP**

SOLV-EX CORPORATION, JOHN S. RENDALL, and HERBERT M. CAMPBELL, II,

Defendants.

FINAL JUDGMENT OF PERMANENT INJUNCTION AND OTHER RELIEF

THE COURT entered its findings of fact and conclusions of law in this matter, which are incorporated herein by reference, on March 31, 2000. After the parties were unable to agree to a form of judgment, further testimony and evidence was received at a hearing on May 15, 2000. The Court having found that Defendants Solv-Ex Corporation ("Solv-Ex"), John S. Rendall ("Rendall"), and Herbert M. Campbell, II ("Campbell") violated Section 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77q(a)] and Sections 10(b) and 13(a) of the Securities Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78j(b) and 78m(a)], and having concluded that there is a reasonable likelihood that the Defendants will engage in future violations unless enjoined;

Now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that Solv-Ex, Rendall and Campbell, their officers, agents, servants, and employees, and those persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise, and each of them, be and they hereby are permanently restrained and enjoined from violating Section 17(a) of the Securities Act or Section 10(b) of the Exchange Act and Rule 10b-5 by, directly or indirectly, in the offer or sale of any securities by the use of any means or instruments of interstate commerce:

(1) employing any device, scheme or artifice to defraud; or

(2) obtaining money or property by means of any untrue statement of a material fact or omission to state a material fact.

IT IS FURTHER ORDERED that Solv-Ex, Rendall, and Campbell, their officers, agents, servants, and employees, and those persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise, and each of them, be and they hereby are permanently restrained and enjoined from violating Section 13(a) of the Exchange Act by, directly or indirectly, filing or causing the filing with the Securities and Exchange Commission of any periodic report on behalf of any issuer, which contains any untrue statement of material, or which omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

IT IS FURTHER ORDERED that Defendant John S. Rendall shall pay a civil penalty of $5,000 pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 775(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)]

within 30 days of the entry of this Final Judgment. Such payment shall be made to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and a cover letter indicating such payment shall be sent to counsel for the Securities and Exchange Commission, Central Regional Officer, 1801 California Street, Suite 4800, Denver, CO 80202.

IT IS FURTHER ORDERED that Defendant Herbert M. Campbell, II, shall pay a civil penalty of $5,000 pursuant to Section 20(d) of the Securities Act and Section 21(d)(3) of the Exchange Act within 30 days of the entry of this Final Judgment. Such payment shall be made to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and a cover letter indicating such payment shall be sent to counsel for the Securities and Exchange Commission, Central Regional Officer, 1801 California Street, Suite 4800, Denver, CO 80202.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for purposes of enforcing this Final Judgment.

There being no reason for delay, the Clerk of the Court is hereby directed, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, to enter this Final Judgment forthwith.

Dated at Albuquerque this 16th day of May, 2000.

By: s/Bruce D. Black
Bruce D. Black
United States District Judge

Counsel for Plaintiff:

Julie K. Lutz, Thomas D. Carter, SEC, Denver, CO
Raymond Hamilton, SAUSA, Albuquerque, New Mexico

Counsel for Defendants:

Richard H. Goldberg, Friedlob Sanderson Raskin Paulson & Tourtillott, Denver, CO
Robert A. Johnson, Karla K. Poe, Eastham Johnson Monnheimer & Jontz, Albuquerque, New Mexico

EXHIBIT A 5

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

No. 00-2339

vs.

SOLV-EX CORPORATION,

Defendant,

and

JOHN S. RENDALL, and HERBERT M. CAMPBELL, II,

Defendants-Appellants.

ORDER

Filed June 16, 2004

Before **HENRY, PORFILIO,** and **MURPHY,** Circuit Judges

Appellant Rendall's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/
Deputy Clerk

EXHIBIT B 1

CASE NO. 00-2339

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

PLAINTIFF - APPELLEES,

v.

SOLV-EX CORPORATION,
JOHN S. RENDALL, and
HERBERT M. CAMPBELL,

DEFENDANTS - APPELLANTS.

On Appeal from the United States District Court for the District of New Mexico
Honorable Bruce B. Black

Docket No. Civil Action No. 98-860-BB/RLP

APPELLANT'S SUPPLEMENTAL BRIEF

FILED BY JOHN S. RENDALL, DEFENDANT - APPELLANT

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ATTACHED APPENDIX

1. Transcript of video depositions of Alexander K. Logwinunk dated February 15, 2000 in Case 98-860 BB/RLP, SEC v. Solv-Ex

2. Ex 111 App F, Summary of Logwasher Tests Canada Plant

3. Ex 814 letter dated August 16, 1996

4. Ex 504, page 4, Analysis of Gibson/UTF bitumen for solids content

5. Ex 804, Slide 12, Alumina properties - Solv-Ex

6. Ex 1102 video tape "CBC" Edmonton Lakes of Death, June, 1991

7. Ex 1103 video tape Solv-Ex Oil Co-production, 1998

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW
SUPPLEMENTAL

A. Supplemental clarification of January 23, 1996 press release.

- Whether Rendall knew or should have known the problems revealed in an autopsy report issued in March 1996, which the lower court believed made the press release false and misleading.

- Whether the test reported on January 23, 1996 was material to the Solv-Ex mineral/oil co-production project with an audited feasibility study and permits for construction.

B. Statements of Rendall on Ti02-S's potential for use in paper industry found materially false and misleading.

- Whether Rendall knew or should have known of the opinions of these hired by Rendall's experts to carry out tests, and whether he had a factual basis to rely on his experts in making statements on the Ti02-S potential for use in the paper industry.

- Whether the findings of the lower court, based on the opinions of lawyers analyzing technical documents of preliminary research and development progress was material to the Solv-Ex project for minerals and oil production under construction.

C. Material facts related to the three statements set forth in Conclusions of Law, paragraph 11. Bitumen production began on March 29, 1997; the successful cell test of January 23, 1996; Ti02-S suitability for certain applications in the paint and paper industries were stated by the lower court to be misrepresented.

- Whether there are material facts misrepresented in the statements when they were made to the public.

- Whether the oil/minerals co-production facility under construction was mistakenly related to the research and development of filtration of bitumen, aluminum production and Ti02-S for paint and paper.

D. Material facts omitted/falsely stated by Rendall.

- Did Rendall know?

- Basis for imputation of Rendall's knowledge. Was there a factual/legal basis for the imputation.

- Were there any statements in the SEC filings which were false or misleading, including any material omissions of fact.

II. BRIEF DESCRIPTION OF THE NATURE OF THE ACTION SUPPLEMENTAL

This action was brought by the Securities and Exchange Commission ("SEC") against Solv-Ex Corporation, John S. Rendall and Herbert M. Campbell in the United States District Court for the District of New Mexico.

The allegations of the action were summarized as:

> "This action involves false and misleading statements made during January 1995 through April 1997 concerning Solv-Ex Corporation ("Solv-Ex"), a public company which claimed to have developed methods to extract and process oil and industrial mineral from oil sands and a technology to produce metallic aluminum. The public statements fueled a dramatic rise in both the price and the trading volume of Solv-Ex's common stock." Complaint, ¶ 1.

On March 31, 2000, the trial court found Solv-Ex, Rendall and Campbell in violation of § 10(b) of the 1934 Act and Rule 10 b-5 there under, and § 17(a) of the 1933 Act regarding statements made in the SEC filings and by Rendall and Campbell, executives of Solv-Ex. The executives were fined $5,000 each with an injunction.

Rendall, pro se, appealed the verdict to the Tenth Circuit Court of Appeals and an Order was filed on August 4, 2003 by the three-judge panel of this Circuit. The case was remanded to the trial court for the limited purpose of ascertaining whether or not the issues presented for review in this supplemental brief were "clearly erroneous" under Fed. R. Civ. P. Rule 52(a).

The trial court responded with an amended Findings of Fact and Conclusions of Law on September 24, 2002. Upon inquiry and request, Rendall procured this document on October 2, 2003. On October 6, 2003, the Appeal's Court gave Rendall/Campbell 15 days to address the Findings, allowed the SEC 15 days to respond, and gave Rendall/Campbell 7 days to reply to the amended filing.

III. STATEMENT OF FACTS RELEVANT TO THE SUPPLEMENTAL ISSUES SUBMITTED FOR REVIEW

In order to examine the materiality of the statements of Rendall/Solv-Ex, it is necessary to understand the factual background of the statements under consideration.

The basis of the company's statements was the progress of its oil/mineral co-production technology towards commercial demonstration of its economic enhancements with environmental benefits compared to existing producers in the Athabasca oil sand deposits of Canada. Also, see pre-admitted (Tr 21) video Ex 1102.

The company also informed its shareholders regularly about its research and development activities for the ongoing future which consumed about 5% - 10% of its budget. This involved a new aluminum cell based on the solubility of the Solv-Ex alumina for lower temperature production, the characteristics of an alumina derivative, which Solv-Ex named Ti02-S, and alternative bitumen production based on its filterability (this alternative was never disclosed to Solv-Ex shareholders).

In response to the Amended Findings of Fact and Conclusions of Law of Judge Bruce Black dated September 24, 2003, Rendall submits this supplemental clarification of the time line of Solv-Ex activities and their relationship to the statements of Rendall which are being examined. **The amended chart 7A is attached hereto as page 4-A, following this page.**

FACTS OF THE AMENDED FINDINGS OF FACT
with numbering corresponding to the trial court's Findings dated September 24, 2003

". . .

7. This is the old paragraph 15 with an additional finding on the new electrolytic cell and Ti02-S "never proved successful beyond the scale or bench" -- the impression created was that each one was moving forward with great success. There is no evidence provided to show "what created" this impression, if indeed, it was created.

...

9. This finding is new and based on Ex 766. A letter to shareholders from Rendall dated May 1995.

At this date the facts are:

a) There was no permitted oil/mineral co-production project on Lease 5 - old paragraph 14 -- the formal approval of permits December 12, 1995.

b) The other project of minerals (in particular alumina) from tailings sludge of other producers was permitted on December 18, 1995. Ex. 788.

c) The research and development project of the new electrolytic cell revealed corrosion problems. Paragraph 5 of Ex 766, but expressed optimism these could be resolved.

The "optimism" was caveated adequately in the Solv-Ex quarterly filing with the SEC for quarter

ending September 30, 1995, page 17, regarding the successful pilot plant work for financing (a) and (b) above.

"The Company believes the on-going work at its pilot plant has been successful and is optimistic that the funds required for commercialization of its technology can be raised. There can be no assurance that such funds can be raised, however --

— In this regard, the Company has never generated significant revenues from operations and cannot expect any significant revenue from operations until operations commence from a plant to recover metal products from oil sands tailings or through development of its oil sands lease.

. . .

(c) Research and development (electrolytic cell) in Ex 863, page 13, of the Solv-Ex June 30, 1995 10K SEC filing reported "encouraging results" but "considerable work must be performed" with respect to the new electrolytic cell."

The filtration issue is addressed in detail in Rendall's Appellant Brief, pages 29-30, which is incorporated by reference. The Gibson letter Ex. 107 in the Findings is found as Ex. 513 (these are cross references of the SEC and Solv-Ex exhibits). The amended Findings of Fact and Conclusions of Law re-emphasize the addition of "filtered bitumen" into all statements of Solv-Ex and Rendall. This erroneous and unsupported assumption colors all its Findings.

". . .

23. The implication of this extract **which is not** from the video testimony of Logwinuk "like trying to filter cold molasses or tar" is misleading in so far as all the testing of bitumen filtration was under Dr. Alex Logwinuk's control and the line of communication was from the research and development Director Massoud Ahghar. See Ex's 537, 538, 539, and 546.

a) Bitumen filtration tests were for operation at 382° at 370 psig (water boils at 212° and 15 psig - atmospheric pressure). Ex. 540, page 3.

b) Alex Logwinuk's comment on filtration dated October 29, 1996, Ex. 539, is very revealing:

If I am not mistaken, Mott had indicated that the filtered product would contain 0.05% Wt% solids. If this is indeed the case, and we only have to produce a product with 0.5% of solids, we can bypass the filter with some of the feed. For example, if the feed contains 4% solids, eleven and a half percent [11.5%] of the feed can bypass the filter. This of course is only of interest as a possibility for commercial operation.

c) Report of Alex K. Logwinuk, Ph.D ChE. (AKL) dated April 27, 1999, pursuant to Rule 26(a)(2) Fed. R. Civ. P. Ex. 535, page 1:

"In late 1994, a group of technology specialists were assembled by Solv-Ex and met in Albuquerque to review Solv-Ex's pilot plant operations and to determine future requirements, commercial plant construction as well as to review

and comment on Solv-Ex's feasibility study. The consensus was that a commercial installation, based on Solv-Ex's technology would be a viable project. The bitumen recovered could be sold as bitumen or upgraded to a less viscous much more desirable, pipeline able product."

Filtration tests conducted by and designed by Mott under AKL were not part of the permitted oil facility, and were ONLY as a possibility for commercial operation. No imputation of filtered bitumen can stand the light of the evidence that it was not disclosed or intended to be read into any disclosure of Solv-Ex and/or Rendall.

. . .

d) The transcript of the video deposition of Alex Logwinuk referred to by this Finding is attached Exhibit 1.

The transcript is very revealing and shows:

- Page 12 - This definition of viscous material does not refer to molasses - but to pancake syrup which does not flow when cold but when heated flows easily, and page 33 wherein bitumen viscosity cold is compared to hot.

- Page 88 - Bitumen from Ex 544 taken from the 600 barrel knock out drum (Ex 111, App F) which leads to the filter contained 2% solids -- **It was marketable**.

- Page 112 - Marketable crude oil can contain 2-4% w/w solids.

- Page 111 - The standard for pipeline able crude oil for solids content is 0.5 percent by weight.

This confirms Rendall's trial testimony on Ex. 814 (Ex 20) Tr 184 and the marketability of Gibson/UTF bitumen referred to page 1 of the exhibit. (It had 2% solids).

24. There is NO FACTUAL BASIS for Finding 24. Rendall clarified in Tr 184 the 0.5% wt. bitumen was intended to refer to pipeline able bitumen, while marketable bitumen (trucking by Gibson) had a specification of 2% by weight solids. Ex 814 is attached as Exhibit 3. This is confirmed by Alex Logwinuk's video transcript, pages 111 and 112, attached as Exhibit 1.

25. This is the old paragraphs 23 and 24.

Solv-Ex/Rendall had no intention of using the term "filtered bitumen" in any communication with shareholders and still less as consistently producing filtered bitumen and could not have possibly used the expression "marketed filtered bitumen." From the beginning, Bitumen or upgraded visbroken bitumen was to have been marketed as reported by Dr. Logwinuk. It was the company's objective in late 1994. Ex 535. This was long before the concept of "filtering bitumen" reached the drawing board as a concept in late August 1996. Readily marketed bitumen related to the Gibson/UTF material tested at over 2% solids (attached Exhibit 4)

26. This is the old paragraphs 26 and 27.

This confirms that the Gibson agreement did not contemplate "filtered bitumen." In fact, Ex 513 quoted as 107 was dated June 12, 1995 for bitumen product from the permitted bitumen extraction facility. Filtered bitumen was a research and development concept just being investigated in late August 1996. No disclosure was called for as there were, in fact, no plans to do anything but test the concept in a pilot plant sized filter as the bitumen production facility. No disclosure was intended until the test results showed commercial economic enhancement for the bitumen being marketed or visbroken before marketing, AKL report Ex 535, page 1, and Ex 539, AKL's view of the Mott filter objective.

27. This is the old paragraphs 28-31 combined.

The Mott filter design in October 1, 1996 was not part of the permitted and under construction bitumen extraction facility, and could not have been as the permit was issued on December 12, 1995, based on the Gibson "marketing bitumen" letter of June 12, 1995, reviewed by Pace Consultants on August 16, 1995. Ex. 516.

The time line of events is confusing. It attempts to link research and development facts not disclosed to the public (filtration) with publicly disclosed facts of permitting construction and marketing which had been consistently reported prior to the concept of filtration at the research and development stage, August 27, 1996, Finding 25.

31. The widely publicized production schedule for bitumen in the first quarter of 1997 related to the commercial project which was permitted and under construction and was not based on a filtered bitumen product.

The snapshot of an independent research and development project which had not been publicized is the substance of this Finding. The relevant statements of Jerry Fox, Tr 588, speaks for itself.

32. The December 3, 1996 conference call did not and could not have been related to the independent research and development filtration which started as a concept only in August 1996. The Gibson letter of marketing bitumen or visbroken crude dated Jun 12, 1995 proves the genesis of the statement.

The conclusion of the link of this statement with filtration has no factual basis.

. . .

34. The quotations of Findings supposedly from Fox video testimony is incorrect. There is only the Fox deposition testimony used at trial in examining Dr. Jerry Fox (A witness). Factually, the live testimony of Dr. Fox shows that he was not involved in the testing, design, permitting and construction of the bitumen extraction project.

He was on site only for commissioning and the research and development filtration project having rejoined the company in mid 1996. Tr 573,

id at line 22; Tr 574, id, lines 15021; Tr 575, id, lines 4-7.

The Gibson 'bitumen' currently marketed referred to in Rendall's August 26, 1996 letter, Ex 814, was not filtered bitumen. In fact, the Fox testimony, Tr 619, refers specifically to the quality of the bitumen from 2 BBLS of the Gibson/UTF production tested at 2.26% fines and 2.37% fines. Ex 504, page 4, lines 8 and 9.

The bitumen produced in the first commissioning of the extraction facility on March 29 & 30 was in Fox's presence, Tr 607, id lines 18-23 and the filtration tests of the produced bitumen did not commence until early April, Tr 591, id lines 24-25.

The quotations of Fox video cannot be commented on as no such evidence exists in the record.

. . .

37. The filtration research and development project was independent of the bitumen production from the log washer. The reports of the research and development team for the filtration, Alex Logwinuk, Massoud Ahghar and Jerry Fox, had no bearing on public statements of Rendall/Solv-Ex. This research had never been disclosed. No evidence for the linkage is provided.

. . .

40. Rendall's statement is ruled on as a material misstatement as it was without a factual

basis.

a) The pilot plant operation was the basis for the scale up to commercial. This was examined thoroughly by independent experts, Pace Consultants, and Dr. Alex Logwinuk as the Findings 59, 60 and Ex 535.

b) The conclusion that the process works is evidenced by the actual commissioning run witnessed by Dr. Jerry Fox on March 29 and 30. Tr 607, lines 4-7, wherein samples were taken directly from the log washer and the knock-out drum where the bitumen was stored, Tr 607, lines 18-21. The results were in the range of 2% solids. Tr 607, lines 21-23. Also see pre-admitted video, Exhibit 1103.

c) The filter was not tested as part of the commissioning, TR 590, lines 16-17, J. Fox testimony.

d) The bitumen product which Gibson marketed contained about 4% solids. Fox testimony, Tr 579, id lines 19-20; Tr 608, Ex 504, page 4, lines 8-9.

41. The facts of the March 28, 29, 1997 first commissioning run bore out Rendall's opinion of February 25, 1997, insofar as "this thing ran immediately" (Fox Tr 607, lines 4-7) and produced good oil within a day (Fox Tr 607, lines 18-23).

. . .

43. The Ex 111, App F, attached as Exhibit 2, was accepted by the trial court. The conclusion of "Solv-Ex personnel" as to the water circulation and clarification is not mentioned or alluded to in the App F. What was stated in App F, page 2, about the first commissioning run March 29, 1997 is:

"a) Total tar sand in = 12 (hours) *75 (tonnes/hr) = 900 tonnes.

b) Bitumen in K.O. (knockout drum) = 2980.02 (fr^3) 62.43 (lbs/fr^3) = 84.41 tonnes.

c) J. Fox, Tr 607, lines 21-23, reported about 2% tines in bitumen in the knock-out drum."

For purposes of reporting in bbls of bitumen produced 7bbls = 1 tonne - (i.e.) about 600 bbls in the K.O. drum. This is not theoretical but actual production.

44. Combines the old paragraph 46 and 47 with further conclusions.

a) The old paragraph 46 finding was referenced to Fox trial testimony with a transcript reference. In fact, there is no such reference in the transcript to support any of the findings of either the old paragraph 46 or the new paragraph 44.

b) The new paragraph 44 finding corrects this reference by now referencing a non-existent Fox video testimony. There is no such video on the record.

c) The burden of evidence for this finding of fact is Ex 111 App F. This was specifically referenced by Judge Black at the trial during Fox's live testimony, Tr 601, lines 7-11.

d) This document was produced by Solv-Ex personnel from data gathered by them during the March 29, 1997 test. Fox Tr 601, id lines 17-18; lines 21-23; and reviewed by Fox Tr 601, id lines 14-15.

e) The test reported from data collected total tar sand in =12 (hours) *75 tonnes/hr = 900 (tonnes) Total bitumen in knock out drum = 2980.02 (fr^3) *62.43 (lbs/fr^3) = 84.41 tonnes. Rendall testified to 600 BBLS at 7BBLS/ton. Tr 311, id at lines 21-22.

f) The process parameters during the operation were reported on where possible, and reasons of lack of instrumentation where it was not possible to report the parameters of operation.

g) This report prepared independently of Rendall is confirmed by Rendall's testimony at trial. The test produced marketable oil at less than 2% solids. Tr 309, lines 9-10, 21-23, based on a dozen samples of over the 12-hour run, Tr 309, lines 14-20, which was checked in Report Ex 544 as 2%. Tr 311, lines 16-25; Tr 312, lines 1-13.

h) Rendall's testimony was not rebutted at trial and is confirmed by Ex 111 App F which establishes the validity of the March 31, 1997 press release.

i) There was no filtration test connected with this run, Fox Tr 591, id lines 24-25, prior predictions

were fulfilled and NASDAQ expectations were met. See item g).

45. The Ex 111 App F confirmed by Fox Tr 601, lines 14-15 (3 witnesses), establishes Rendall's trial testimony that the conference call was, in fact, a correct representation of what occurred at the March 29, 1997 start up of the plant. (See Rendall's response, finding 44).

46. This is the old paragraph 49 with the words "It was not coincidental" added. No explanation is afforded, nor conclusion is drawn from this unsupported (by the evidence) observation.

47. This is the old paragraph 54, with the added conclusion on "the overly optimistic prediction made with regard to the timing or amount of production from the Alberta plant." In actual fact, only one test run was reported on March 31, 1997, Ex 850, and this produced 600 BBLS of bitumen (84.7 tonnes) Ex 111 App F, id at page 2. This was more than the 500 BBLS predicted, Ex 832 P.1, Finding 37.

48. Once again we have the reference to the non-existent Fox video testimony replacing the Fox trial testimony (old paragraph 50).

49. This quotation from Ex 111, P. 11, is completely mischaracterized to apply to the log washer circuit completely ignoring Finding 54 of the first attempt at findings. The exact statement was:

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"The 24" filter was operated successfully in Canada, on the 21st April for 2-3 cycles producing 2 barrels of oil, at a back pressure of 170psig and feed conditions at 230psig and 360° but problems developed on the feed pump and the system was shut down.

Refer to Appendix E for the operational report on the 24" filter in Canada which successfully produced 2 barrels of oil."

and Judge Black knew that the report on the log washer circuit was Appendix F, Fox Tr 601, lines 7-11.

50. Once again, we have the non-existent Fox video testimony replacing the Fox trial testimony of the old paragraph 51.

51. The cut-off date for the SEC complaint was March 31, 1997 and the discovery and evidence for statements made subsequently was only selectively introduced as it related to the March 31, 1997 press release.

The Finding 46 has referred to the placement of $22 million stock debentures of which $12 million was immediately available, Ex 853. The program was costed out within this budget to meet the objectives of the April 30, 1997 press release – This "coincidental" issue was not in evidence, Rendall Tr 218, lines 10-23, indicate the purpose.

. . .

53. The company Solv-Ex was never in the market selling or attempting to sell or advertising to

produce or stating that it would produce "filtered bitumen." This Finding is without any evidentiary basis. The old Finding 56 found "any bitumen" and the new Finding 53 now says "filtered bitumen." No evidentiary basis is provided for this specificity. Any bitumen is sellable, Alex Logwinuk's video testimony, page 112, specifically 2-4% solids.

. . .

65. This is the old 68 with an "additional comment" on UDC or DL Labs recommendation for further research and development work being omitted in the September 5, 1996 conference call. NO reason is given as to why this was important in reporting on the progress of research and development work. Rendall Tr 229 gives Rendall intent.

. . .

68. The finding of "grinding equipment" in flow sheets for the proposed minerals plant in Alberta, is without evidence and is factually incorrect. The proposed mineral plant in Finding 59 did not propose production of Ti02-S.

. . .

73. This finding is the old 76. This recommendation of Mr. Forrester in a research and development project was part of the on-going research. The proposed mineral plant in Finding 59 did not plan to produce and market Ti02-S.

74. This finding of Solv-Ex research and development efforts for future products, as

disclosed in paper chemicals, was not in the proposed minerals plant finding 59. There had been a decision to proceed with testing, and Mr. Forester's opinions were taken into account in making those decisions. There is no evidence that they were not, and no material omission can be deduced.

75. The Ti02-S research and development project as postulated for the future and 'our objectives ' were to be successful in our efforts. There is no evidence that Ti02-S had failed to produce a satisfactory formula. All Solv-Ex personnel and its consultants testified to the opposite. Dr. G. Iomides and Mr. M. Ahghar were skilled and acknowledged as such by their peers in the paper industry and testified at length at trial. The conclusion of the finding has no basis in fact and is rebutted by Rendall Tr 234, lines 9-16; Tr 235, lines 12-17.

. . .

80. The Ti02-S research and development objectives and plans were extensive in testimony of Rendall, Ahghar and Iomides. (Those in the know of the whole program). This has been ignored with conclusory statements based on cherry picked technical exhibits to set aside the bulk of research which the trial court chose to ignore. There is no factual basis as Rendall stated, Tr 224, that the 10k 1996 disclosure was the bedrock of Rendall's disclosures. Rendall's trial testimony covers his understanding of the facts of research and development of Ti02-S, Tr 239, lines 4-1[illegible] (grinding), Tr 244, lines 11-23, paper/Raisio. Tr

235, lines 12-17 (sample size of 400 grms represent 1000 lbs of Solv-Ex produced Ti025). This program cannot be connected to finding 59 of the minerals extraction plant which was not designed or permitted to produce Ti02-S.

. . .

92. **The 1995 Form 10K** was based on work done in 1992, 1993, 1994. Finding 55, 56, 58, and 59 wherein work was based on processing 100's of tons of clay tailings, with the alumina process and quality checked, see attached exhibit 5 from Tr Ex 804, verified by consultants and sources in the aluminum - aluminum industry. There were literally over 100 such analyses in that period outside the evidentiary scope of the trial.

Finding 60, Ex 550, summary of the Cumming Cockburn Ltd. independent review of the mineral plant shows that on page 14:

"CCL's project team inspected Solv-Ex's existing pilot plant in Albuquerque, New Mexico and have discussed the proposed process in detail with Solv-Ex staff. Dr. Angelov, a specialist consultant to CCL with expertise in alumina production, has confirmed that the process is technically sound and practically achievable. The quality of alumina produced by this process can be expected to be of high grade. Other products would be produced in lesser quantities which could also be marketed, including potassium sulphate which could be sold mainly as fertilizer, and ferrous sulphate which could be sold for use in water treatment. The process would produce very

minimal amounts of airborne gasses which could economically be controlled to more than meet the environmental emission requirements. Other waste produce include clean backfill and reasonable clean water."

"Operating pro formas have been prepared which indicate repayment within about 3 years from start of production, should this be desired, or, based on a 10-year amortization period, debt coverage ratios ranging from 1.79 in year 1 to 4.06 in year 10, assuming 3% annual inflation."

This is a complete rebuttal of the additions to the original Finding 96 on which this finding is based.

. . .

98. The facts and circumstances of the January 23, 1996 press release were in the un-rebutted testimony of Rendall, Tr 467. Tr 469, lines 23-25, which is referred to because of its importance as to both Rendall and Campbell's knowledge on that date.

> Q. And then just for a moment – I apologize, it's out of order. But this press release of January 23, 1996, Exhibit 753, the Government's Exhibit 11. . ."

The press release was read to the entire team of Pat Davey, Otto Vondrak, Arthur Ainscough, Strahl and Kennedy, id 468, lines 21-23, before Pat Davey and Rendall approved it for release to the public, lines 1-5.

As to the autopsy report, Rendall's un-rebutted trial testimony was Tr 94, lines 7-16; 95, lines 3-13:

> "A. There were six people who were involved in the autopsy. Two of them -- one of them being Dr. Strahl wondered, before he went away, about the mechanism. We looked at it further, and we found that the mechanism had been established. But it was put in the summary as a record of what people's views were. And that person's views -- Dr. Strahl was one of those views. But the team established the mechanism. So we decided to design the commercial cell in March. We did know the mechanism."
>
> . . .

Paragraph 3, it says, "The severe erosion and pitting was most probably the direct result of contact and rapid alloying of the aluminum metal," which is what the team had already decided.

> Q. It says -- (Dr. Strahl's report)
>
> A. It says -- what is surprising is that a relative -- halfway through the paragraph a relatively constant voltage and amperage were maintained during a long period of operation of the cell. In other words, he's saying, yes, we do know there was constant voltage, and it's surprising and it is the result." (This was a description of the mechanism)

In the January 23, 1996 press release referred to in Rendall Tr. 469, lines 3-23:

"Q. Here you're talking about Solv-Ex successfully completing initial testing of its new aluminum reduction technology and a prototype electrolytic cell. Were you telling the public that you were ready to commercialize this process on January 23, 1996?

A. Absolutely not.

Q. You had more testing to do, did you not?

A. That was just the first test.

Q. And you indicated in the next paragraph you were going to have ongoing tests, correct?

A. Oh, yes.

Q. And that's what these lab tests were that you just talked about; is that correct?

A. Yeah, we had to redesign the cell.

Q. And you began to redesign the cell after the autopsy, correct?

A. In March.

Q. And that was the purpose of the autopsy primarily?

A. Correct.

. . .

102. The addition to the old paragraph 102

"aluminum cell working continuously "never existed" is a comment without any basis, and to which there was adequate testimony for eg. in Ex 748 Report #6u" Solv-Ex aluminum 100 hrs non-consumable anode tests at 0.5 and .10 ampere current density, February 13-22, 1997.

103. The trial court refuses to believe the Ex 732 to 754 outlining tests based on anode creation by Solv-Ex Ex 731 0.

104. The trial court calls the Ex 748 produced by the research and development center on a 100 hr non-consumable anode test - a misstatement of fact without any evidence that the facts were misstated.

. . .

108. This conclusion is based on a Metcalf remark. Metcalf work was research and development of new process/products - the actual oil-mineral co-production was designed on test data produced from 1992-1994 Finding 59 - this was 2 years before Metcalf.

- The reason for Rendall's efforts are shown in a video Ex 1102. This was not a dream (Exhibit enclosed).

- The result of Rendall's efforts are shown in a video Ex 1103 (Exhibit enclosed). This bitumen extraction facility was built. These exhibits were pre-admitted, Tr 21, lines 15-22 based on Finding 59.

-

109. The Solv-Ex 1996 10K Ex 863 filing accurately describes the product, its progress, the problems with clear unambiguous caveats, as will be referenced. The research and development projects show a reason for their pursuit for the new aluminum cell Ti02-S (filtration was not disclosed).

The caveats.

Bitumen extraction facility

"Since the technology has not been tested on a commercial scale, there can be no assurance that the bitumen extraction plant will perform as anticipated, will be completed on schedule or that it will not require modifications to achieve anticipated performance." Id page 8.

"As in the case of any new operation, particularly one in which a new or second generation technology is involved, the degree of success will be measured against actual operating results and will probably be affected by factors which have not been considered by or known to the Company." Id page 9.

Research and Development, Id pages 15, 16:

"The Company has an on-going research program with respect to determining the full range of potential products which can be produced from the Athabasca fine clays using its technology. Much of this work is conducted in conjunction with end users of various products or entities which specialize in marketing various potential products other than metallurgical grade (or "smelter grade")

alumina. The objective of this program is to optimize the product revenue stream which can be derived from minerals production, recognizing that metallurgical grade alumina provides the economic foundation for minerals production because of the potential magnitude of minerals production and relatively limited markets for other products which may be produced. **Among the ongoing research are the following:**

The use of an electrolytic cell to produce aluminum metal from metallurgical grade alumina produced through the minerals extraction process.

. . .

Although considerably more work must be performed to confirm total feasibility of the process, the results of testing to date have been very encouraging and the Company has in fact produced aluminum metal in tests of the cell at the Company's Albuquerque Research Center and Pilot Plant.

Rendall's un-rebutted trial testimony Tr 96, id lines 2-3:

Ti02-S. The Company is also testing means of producing a potassium-based synthetic mineral which can be used as a pigment and filler in the paper, paint, and plastic industries. This mineral appears to have physical characteristics, such as brightness, similar to titanium dioxide that is currently being used. The Company refers to this product as "Ti02-S." Although initial indications are favorable, further research and market analysis

needs to be accomplished on this product. In this regard, a commercial pilot test of the product for use as a filler is scheduled to be performed at an industry-recognized facility in the near future in order to confirm bench-scale work already performed successfully.

Jim Nielsen - Bud Metcalf deposition testimony related to the other research and development referred to below. The oil-mineral co-production design had already been accomplished in 1994. Finding 59.

"Other research and development is ongoing on other aspects of the minerals extraction process as well. There can, however, be no assurance that the research and development efforts, even if successful, will result in commercially-viable processes."

IV. THE SUMMARY OF THE ARGUMENT

The trial court did not add any new evidence to buttress its findings in either the specific areas of interest to the appeals court, or the evidentiary holes relating to purported facts and imputed facts. The specifics of what was added as not being any "new evidence" is dealt with both in the statement of facts and in the argument.

In addition, Rendall/Appellant can now argue the facts from the evidence in the trial and the exhibits (pre-admitted) as his scienter is now called into question in the Findings. This is addressed in the statement of facts. The preponderance of the evidence shows that any finding of the trial court of Rendall's scienter in this trial is clearly erroneous without an evidentiary basis.

The trial courts clear error is based on a mixed time line -- events of the company's oil/mineral co production project finalized for construction, 1992 - 1994 (Finding 59) and the SEC's complaint which dealt with subsequent research and development product/process potential, 1995-1997, and mixed it up with the plant under construction and commissioned in March 1997 for bitumen production (based on 1992-1994 work not in evidence).

The Findings of Fact are clearly erroneous and the conclusions of law derived there from must fail the trial court's Findings of Fact and Conclusions of Law are respectfully requested to be reversed by the Appeals Court for the reasons enumerated in this brief and the original Rendall brief.

V. THE ARGUMENT ON MATERIALITY - SCIENTER - TIME LINE

The only amended findings reviewed are those original findings (old) which were amended by Judge Black in response to the Court's order of August 4, 2003.

Findings of Fact are not supported by the record so Issues IA, B, C and D are clearly erroneous Findings of Fact and Conclusions of Law of the Trial Court.

I-A. The January 23, 1996 press release is re-examined by the trial court in its Finding 98.

The facts known or could have been known on January 23, 1996 regarding an electrolytic cell at around 700°C were the voltage and amperage which remained constant. T. 95 quoting Dr. Strahl autopsy report.

The whole team operating the cell spoke to Herb Campbell who wrote the release which was reviewed by the team before publication, Tr 467, 468. The facts contradict the trial court's imputation that Rendall knew otherwise.

The autopsy report was considered by the whole team as a basis to move forward with the design of another (larger) cell with more test work needed to establish design parameters. See comments in remarks on the Finding 98 in Statement of Facts.

I-B. The Ti02-S statements of Rendall and Campbell. These are clearly erroneous findings of the trial court on linking the research and development project (circa 1996-7) with the permitted mineral production project of Finding 59 (circa 1994). This error permeates Findings 65, 68, 73, 74, 75, 80, and 92 which are examined in detail to show that the facts found are misconstrued and imputed to Rendall without any evidentiary basis. Rendall's knowledge of the facts of research and development, Tr 239, lines 4-13 (grinding-particle size), Tr 235, lines 12-17 (amount of production sampled) was the basis of his statements which were accurate and adequately caveated in Ex 863 (the company 1996 10K), page 16, detailed in Rendall's examination of Finding 109.

I-C. The three statements set forth in the trial court's original conclusion of law paragraph 11.

(i) Bitumen extraction (filtration)

These are clearly erroneous findings of the trial court on linking this undisclosed information to the public research and development project (circa 1996-7) with the permitted and under

construction bitumen project in Athabasca Finding 59 (Circa 1994). This error permeates Findings 23, 25, 26, 27, 31, 32, 34, 37, 49, and 53, which are examined in detail in the statement of facts and shown not to have a factual basis.

(ii) Bitumen production (the permitted and constructed plant of Finding 59)

The trial court in erroneously linking "filtration" to the bitumen production facility produced clearly erroneous findings regarding the production of bitumen. This error permeates Findings 40, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53 and 108. The facts of Ex 111 App F confirmed in Rendall's trial testimony, show that 600 BBLS of bitumen were produced by Solv-Ex on March 29, 1997 (it was marketable at 2% solids) in the first 12 hours of operation. This was in keeping with Rendall's opinion in February 1997 Finding 41 and statement of January 1997 (Finding 37). Judge Black's findings on the issue of bitumen production were clearly erroneous even in the summary of Finding 107. As video Ex 1103 demonstrates bitumen production and video Ex 1102 shows that basis of Rendall's efforts -- they were no dreams -- just hard work.

(iii) The new electrolytic aluminum cell.

This is a clearly erroneous finding of the trial court in linking this research and development project (circa 1996-1997) with alumina production from the mineral production facility

finding 59 (circa 1994). This error permeates Findings 98, 99, 100, 101, 102, 103, 104, 106 and 107 which examine test results with factually unsupported findings of the January 23, 1996 press release (Finding 98) the new cell dimensions 2'0" x 2'0" in Albuquerque, Finding 99 (erroneously calls this bench scale with no evidentiary basis). Finding 100 without a factual basis and Finding 106 contradicts the Solv-Ex efforts to build commercial non-consumable anodes pre-admitted Ex 758 dated April 1997 and in Pat Davey's trial testimony. This goes to Rendall's knowledge of the facts.

(iv) Ti02-S.

This is covered under item 2.

I-D. Material facts found to have been omitted or falsely stated by Rendall.

i) The trial court incorporated its response to this order of the court on August 4, 2003 in the amended Finding 9, which was clearly erroneous as the prototype electrolytic cell operated on January 23, 1996 (see Finding 98). Findings 24, 25, 26, 27, 28, 32, 34, 35, 37, 40, 41, 42, 43, 44, 45, 47, 51, and 53 suffer from the factually unsupported assumption that 0.5% solid in bitumen was needed to make it marketable (hence filtration tests). This is rebutted by Rendall at trial, Tr 185, lines 14-21, and Alex Logwinuk confirms this video transcript trial testimony, page 112, lines 2-16. Regarding Ti02-S as a paper additive, the courts conclusion in Finding 75 was rebutted by

Rendall in trial testimony insofar as several rolls of paper were successfully produced with Ti02-S additive and sent to Albuquerque, Tr 361, lines 6-19; Tr 369, lines 1-24, but no commercial use was planned until 1998 (line 23). It was potential for the future (lines 15-16). Rendall had a factual basis for all of the statements and adequately caveated them in Solv-Ex 10K 1996, page 16. Further, Findings 76, 77, 78, and 79 have no evidentiary basis to state them as Findings of Fact.

ii) Imputations of material fact knowledge by Rendall.

In summary, no further light is shed on the subject matter, except Rendall is now permitted to bring in testimony as to what he knew were the facts. This testimony was not rebutted at trial. The imputations of omission and false statements attributed to Rendall are clearly erroneous without an evidentiary basis. All of the findings are examined in detail under Statement of Facts and explained in items 1-4.

iii) Filings with the SEC.

Rendall is unaware of what in particular the trial court found misleading in the company's 10K 1996 filings reference Finding 107 and has no other comment on this findings except the Finding 92, which deals with alumina produced, evaluated and tested between 1992-1994, Findings 55, 56, 57 and 59 which tests results are not in evidence except in Rendall's trial testimony Tr 386 and in Dr. Angelov,

independent expert, report of Finding 60, page 14 - high grade alumina from the mineral plant was predicted.

The only reference to an SEC filing 10K 1996 by the trial court in Finding 92 is clearly erroneous from the facts and the evidence as shown above.

VI. CONCLUSION

The Defendant/Appellant John S. Rendall respectfully submits that based on consideration of all of the evidence presented by the trial court, the SEC, the Appellant's in both the original and amended findings, together with the original and supplemental briefs of the parties.

1. The record shows that the trial judge entered Findings of Fact and Conclusions of Law which were clearly erroneous. The record indisputably shows there is no evidentiary basis for such Findings and Conclusions of Law.

2. The Findings of Fact fundamentally confuse the Company's construction schedule with entirely independent research and development activities and should therefore be vacated.

3. The Conclusions of Law based on the Findings of Fact must also fail especially as to any conduct requiring injunctive action still less none may be anticipated in the future. The action is clearly in error.

4. The penalty of $5,000 should be rescinded.

Because the record shows that the trial judge erroneously entered findings of fact which the record indisputably shows to have no evidentiary basis, the

judgment entered in this case should be reversed, and a judgment rendered in favor of Appellant John S. Rendall, with all costs, including attorneys fees, against the SEC.

Respectfully submitted,

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EXHIBIT B 2

CASE NO. 00-2339

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

PLAINTIFF - APPELLEES,

v.

SOLV-EX CORPORATION,
JOHN S. RENDALL, and
HERBERT M. CAMPBELL,

DEFENDANTS - APPELLANTS.

On Appeal from the United States District Court for the District of New Mexico
Honorable Bruce B. Black

Docket No. Civil Action No. 98-860-BB/RLP

APPELLANT'S REPLY BRIEF

FILED BY JOHN S. RENDALL, DEFENDANT - APPELLANT

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Attached Appendix A

Typical industry leaflet on Ti02-S specifications.

I. SUMMARY OF REPLY BRIEF

The limited remand to the United States District Court for the District of New Mexico (Honorable Bruce B. Black) on August 4, 2003 to clarify with specific primary evidence "its findings of fact and conclusions of law" was submitted on September 24, 2003. Appellant Rendall responded on October 20, 2003 to which a reply was received from appellee (SEC) on November 15, 2003. Rendall has used the brief the SEC sent Campbell (another appellant). A copy was received from Campbell November 13, 2003.

The securities and Exchange Commission (SEC) continue to confuse the overall context in which Rendall's statements are alleged to be false and misleading as found by the lower court. All the three issues, filtration of bitumen, the Ti02-S for pigment for paint and paper, and the new electrolytic cell, were not, in any way, permitted under the construction project of Solv-Ex Corporation. Nothing but progress of research and development is the object of the documents now questioned by the SEC as the basis of "findings of fact and conclusions of law". They were internal documents of a technical nature from among 'thousands' of such documents procured from Solv-Ex research and development facilities. The complete picture was that Solv-Ex was continuing to pursue these innovations based on its technical experts overall evaluation of the research based on the preponderance of the evidence. No evidence by any one who produced the documents and nor by the experts who received and evaluated them in order to move the research forward is in the record of the trial. Documents which seem to be "of a negative nature" to non-technical readers, for which they were not intended, are now being "cherry picked" to make Rendall an offender for a misplaced word or for an omission. No evidence has been provided for the materiality of such findings. The progress

of all research and development activities was adequately caveated in the company's SEC filings, and this has not been challenged in court or in the briefs. (Filtration of bitumen was never discussed to the public- it was not in the permitted project).

II. ARGUMENT SHOWING NON-RESPONSE OF SEC

The clarification to fill the holes in the evidentiary basis for the "findings of fact and conclusion of law" has not been addressed by either the District Court (Judge B. Black) or by the SEC Brief.

Rendall details this non-response, specifically in relation to the Statement of Issues presented for Review in Rendall's Brief in Chief (supplementary). Only contemporaneous documents (re SEC Reply Br., page 3) do not support the findings, and the acknowledged mistakes of Judge Black (SEC Reply Br., page 4) taint the facts found.

A. Supplemental Clarification of January 23, 1996 Press Release. Ex 793.

- Document that relates to the January 23, 1996 press release was written on February 12, 1996 as in **Ex 756**. It is a highly technical report form which statements are taken out of context to mean whatever the SEC spins in to mean.

- The Document, **Ex 756**, supports the press release, page 2, Summary. The pilot cell was operated for 2 hours and 52 minutes- stable 1000 amperes at 6 volts (which results in the opening line of the conclusion on page 5). Current flow was established. This was the success reported and was not rebutted by any technical witness, including the SEC's Dr. Sadaway (MIT).

This is what Rendall and the team knew when the press release was issued:

- The press release stated that "ongoing tests" were planned to designed and construct a full scale test of an electrolyte cell to produce aluminum.

- These "ongoing tests" did occur, including the autopsy report, **Ex. 757**, and non-consumable anode identification for test and manufacture. **Ex 731J, 731K, 731L, 731M, 731N** and **731O**, and further testing of such anodes, **Ex. 732 to 754** (22 from January to May 1997).

- The full scale electrolytic cell was designed. **Ex 758** by April 1997.

By any objective standard, the press release of January 23, 1996 cannot be false and misleading. Lawyers arguments on the content of technical documents is not evidence.

B. Statements of Rendall on Ti02-S 's potential for use in paper, which the SEC complained, were false and misleading with Judge Black concurring.

1. Documents re Ti02-S specifications.

The first document relating to Ti02-S referred to in the conference call on September 5, 1996 (this conference call was of a general information nature), on Ti02-S and its potential use in paper, paint and plastics was regarding the first hurdle specifications.

a) The specifications for "brightness" as independently evaluated by Temanex, Ex 564, page 4, was:

"Table 2-1 summarizes the results of these tests, showing that all three pigments have very high brightness which are very close to one another. This places the Solv-Ex B-100 filler in the highest quality category for papermaking mineral pigment fillers, since brightness is a critical pigment quality parameter.

TABLE 2-1

PIGMENT BRIGHTNESS MEASUREMENTS

PIGMENT	ISO BRIGHTNESS (Direct Measurement)	ISO BRIGHTNESS (Calculated In 0-10% Ash Range)
Solv-Ex B-100	95-96%	94-97%
PCC	94-95%	94-96%
Titanium Dioxide	95-96%	N/A**

b) Light scattering, Ex 564, page 6:

2-4 Handsheet Properties - Optical (Brightness, Opacity, Light Scattering)

"Figure 2-2 shows that the Solv-Ex B-100 sample performance in enhancing sheet brightness is in-between that of PCC and titanium dioxide. This essentially puts the Solv-Ex B-100 filler in the highest quality filler pigment range, and capable of completing with titanium dioxide, which delivers at US$(2,000-2,5000)/tonne at paper mills.

Based on our calculations, and the hand sheet light scattering coefficients, contributed by the three fillers to the sheet at about a 10% ash content, are as show in Table 2-2. Again, the Solv-Ex filler light scattering

coefficient is between the light scattering coefficients of PCC and titanium dioxide. Since its particle size distribution is by no means optimized in this early sample, the expectation is that the Solv-Ex filler performance will in fact be closer to that of titanium dioxide following such optimisation."

TABLE 2-2

CALCULATED LIGHT SCATERRING COEFFICIENTS AT 10% SHEET ASH (ROUNDED TO NEAREST 100 CM 2/g)

PIGMENT	LIGHT SCATTERING COEFFICIENT (cm 2/g)
Solv-Ex B-100	3400
PCC	2600
Titanium Dioxide	6100

c) Particle size distribution, Ex 564, page 3:

"2-1 **Laboratory Trial Organization.**

A few hundred grams of the new Solv-Ex B-100 filler, ground to a suitable particle size distribution, were provided to Econotech. It should be noted that, at this stage, the particle size distribution was chosen to be similar to a commercial titanium dioxide.

Solv-Ex used commercial grinding test facilities to secure the chosen particle size distribution. Netzsch, Inc. was given the specification for a test sample of 3.5 gallons as 1.0 micron. They achieved it in two passes to reach 0.47 micron, Ex 590, first and last page:

OBSERVATIONS: The tests ran very smoothly. Approximately 3.5 gallons of slurry were provided. By the time we had adjusted our flow rates, agitator speed and reached a steady state the sample was nearly complete processed. Particle size analysis showed we were not at the 1 um d50. We ran a second pass on the material. This showed a 0.47 um d50.

CONCLUSIONS: The samples were returned to Solv-Ex for their evaluation. A production run is scheduled for September 5, 1996. A scale up to the LME 20 K for the production run is attached. Scale up based on this test shows that LMK 1000 machines would be required for this particle size and production rate.

All these were independent analysis.

2. Quality of BKAS the TIO2-S product produced in a pilot plan run in Albuquerque, New Mexico on September 3, 1996 - 5000 lbs. Ex 640.

3. Tests on paint - DL Laboratories, Ex 588.

The context of this letter-report was based on the TI02-S meeting the specifications (as typically provided by pigment producers eg Pfizer. See Exhibit A, from Ex 564, App. 2, provided in the trial). For evaluation in use for paint, paper, and plastics, the procedures to collect data is reiterative and lengthy with modifications of additives to enhance suitability as proposed independently by Indiana University, Ex 572. This was on the data required for its use as suggested by DL Laboratories referencing the Indiana University recommendation. Ex 562. This first letter report, Ex 588, is the one which is "cherry picked" by non-technical lawyers to mean whatever they spin it to mean. It is not evidence. The fact is that the first test in paint with the

unmodified product was usable in two areas and needed additives for dispersion in a third area. In no sense of the meaning of words does this mean the product did not meet specifications.

The letter-report is taken out of context of the program and the issue of "dispersability" (surely a technical term) is mistakenly taken as meaning other than -- additives need to be added for dispersion in solvent based paints (these are being phased out). I have not quoted trial testimony on the subject as the Judge did not give it any attention. But as documents are now stated to be the basis of the findings, I have examined the documents in the context of other documents presented at trial.

4. Tests on plastics - UDC, Ex 587.

In the context of Professor Harvey's (Indiana University) recommendations for use of TI02-S in plastics, Ex 572 (as the characteristics of TI02-S meets the specification requirements), UDC provided a reiterative program, Ex 566, which was followed by a report on the first test of Ti02-S raw and unmodified by coating or additives. Ex 587. Any objective reading of the report would show that it was "encouraging" with further tests needed and recommendations for additions. It is a technical report with lawyers spinning their own meaning. Some extracts will help.

> "4. RESULTS (page 3 of Ex 587)
>
> A. In Thermoset Matrix:
>
> Flexural strength: We determined the flexural strength by a 3-point flex test, in a modified procedure of ASTM D790.

The pure epoxy resin ranges from about 12 to 15-ksi. Our enclosed sample of 20 phr of your filler in an epoxy resin has a flexural strength of 11,000 psi. Please note that the color of panels is white and your filler can be used as Ti02 extender. As is the case with most fillers, the modulus or stiffness of the resin was increased by the added filler. In our previous programs, we had made similar panels and their testing had shown a higher retained strength than your products. They had strength levels of 12,000 psi or slightly higher. These are preliminary results, so no one should make any firm conclusions until after additional moldings and tests.

5. CONCLUSIONS (page 4 of Ex 587)

The initial conclusions are the following: In both the thermostat plastic and thermoplastic trials, it appears that your products could serve as an acceptable filler. Your filler appeared to mix well in the epoxy liquid resin, and dispersed well in the heated thermoplastic resin. The initial strength values of the filled epoxy and filled polycarbonate at 25 phr loading were lower than those we obtained in prior work with calcium carbonate filler. Since calcium carbonate is one of the lowest cost versatile fillers, it will probably be necessary for you and your company to evaluate different grades and, especially, surface treatments in order to develop cost effective filler grades. Also, our initial test results must be repeated

and verified.

The current price of some grades of titanium dioxide is slightly over $1,00/lb. Good filler grades of minerals are about a 15-cents per pound. You should estimate the potential selling price of your filler, and then determine its price performance versus competing fillers or titanium dioxide.

6. RECOMMENDATIONS and FUTURE WORK (page 4, Ex 587)

We recommend that you should evaluate finer particle size grades of your product, in order to try to obtain better performance than was evident in these initial screening tests.

1. Additional epoxy moldings should be made with your materials, using varying coupling agents and concentrations, and mixing with higher shear rates so that even better dispersion is obtained. Also, try various loading levels of your filler. UDC could determine the flexural strength/modulus versus loading in a liquid epoxy resin and compare these results with commercial fillers.

2. Additional micro tensile samples should be molded with the Solv-Ex fillers at 30% and higher loading in nylon and polycarbonate. Tests would be conducted on these samples and comparisons made with commercial mineral filled nylon and polycarbonate products."

Rendall's observations in Judge Black's Finding 65 were factual from the documentary evidence. Regarding evidence by witnesses in trial, Judge Black's mistakes, acknowledged by the SEC, undermine the findings based on such evidence.

5. Tests on paper. The Forrester letter to Temanex, Ex 609.

The tests of Ti02-S for paper was initiated by the Government of Alberta, Ex 564, for encouraging paper producers to set up mills for production of paper in Alberta using provincial wood pulp and potentially (local) Ti02-S from Solv-Ex. A program was set-up which showed that Ti02-S met the specification requirements, but testing would be programmatic, with enhancements potentially available from additives/coating agents all in Ex 564.

The Forrester remarks, Ex 609. (Forrester was not called by the SEC as a witness).

These were solicited specifically by our expert, Temanex, Ex 607, and fits in the program addressing enhancements from additives. Paper rolls were produced, last paragraph of letter. Forrester also recommends use of "optimum retention aid" to be performed with them. Our experts, Temanex and Raisio, witnessed the tests and got the report. It was evaluated by the technical experts of Solv-Ex fc he programs recommended for trials in paper making machines. Both Temanex Ex 622 program and market strategy and Raisio Chemicals, Ex 622A, expressing high confidence in Ti02-S as a paper pigment (with and without modifications of additives--coating agents) is worth reproducing from Ex 622. This is worth reproducing from Ex 622A. This is a communication from Raisio Chemicals to

Solv-Ex Corporation:

"My comments are as follows:

1. That testing of the filler product Ti02-S in our labs and coating center in Finland gave us some very encouraging results. Based on these first tests, we have a high degree of confidence that Ti02-S can be used both as a paper filler and as a pigment in coating formulations.

   At this point, we are viewing Ti02-S as a line of products, rather than a single product. We feel Ti02-S can be modified to suit virtually all paper filler requirements.

2. The publicity surrounding the Raisio/Solv-Ex alliance has created a number of inquiries from paper companies across North America and Raisio is starting to promote Ti02-S at the CPPA Meeting in Montreal the end of January 1997.

We remain confident that this product can meet or exceed papermakers requirements for fillers and coating pigments.

In summary, this documentary recital on Ti02-S in no way attempts a re-trial, but shows that the SEC's reliance on documents, used in trial in the absence of evidence at trial, shows a completely different picture of Rendall's statements (a few) in the overall context of the Solv-Ex program and

results. Rendall's statements with caveats in the company 10K, E864 reproduced in a previous brief, are supported in the record of the trial.

C. Material facts related to the three statements set forth in Conclusions of Law, paragraph 11. Bitumen production began on March 29, 1997; the successful cell test of January 23, 1996; Ti02-S suitability for certain applications in the paint and paper industries were stated by the lower court to be misrepresented.

The cell tests and Ti02-S are covered in A and B.

1. Bitumen production.

The SEC response of November 10, 2003 on the March 1997 Solv-Ex press release is a reiteration of opinions in four pages, which attempts to camouflage the error of Judge Black's assessment of Ex 111, App F. This material error is admitted by the SEC conveniently mislabeling the error as immaterial. There is no documentary evidence to support the findings on bitumen production. Every finding is tainted as demonstrated in detail in Rendall's supplementary brief. No evidence has been shown from the record, documentary or otherwise to show anything false or misleading in the Solv-Ex press release of March 31, 1997. Ex 850. Reiteration of findings tainted by mistakes admitted by SEC and an apologetic documentary claiming proof, which does not exist, does nothing to rebutt Rendall's supplementary brief, which must be now accepted as unchallenged.

Unsolicited by the court, the SEC then undertakes to use five pages on "marketable bitumen." Once again, the complete documentary picture shows that the court's supplemental finding 24 of Rendall's use of 0.5% wt.

bitumen as pipelineable in Ex 814 has no basis in fact or intent for marketing. Tr. 184. This "cherry picked" statement is not properly read in the light of all the documentary evidence produced in court, or in expert testimony of Dr. Alex Logiwink on the quality of bitumen as marketable. (Transcript of testimony, Exhibit 1 of Rendall's Supplementary Brief, pages 111, 112). The twelve pages on bitumen issues of the SEC supplementary brief is more an "apology for their actions" rather than addressing the order of this court on October 6, 2003. This is a non-response.

III. CONCLUSION

The SEC's supplementary reply brief of November 10, 2003 admits to Judge Black's mistakes in the Findings and now hang their hat on documentary evidence for conclusions of law. Even this device fails to show any wrongdoing in Rendall's communications with the public, still less any scienter (intent to deceive or recklessness), in those communications. Without facts based on the evidence in the record, we cannot reach to conclusions of law other than the whole verdict in 98-860-88/RLP be reversed and the costs of Rendall, as Chairman and CEO of Solv-Ex, including attorneys fees and any other remedy at the discretion of the court, be awarded in favor of Rendall as the Appellant.

Respectfully submitted,

/s/ John S. Rendall
John S. Rendall
4301 Altura N.E.
Albuquerque, New Mexico 87110
(505) 883-2955

EXHIBIT B 3

IN THE UNITED STATES
TENTH CIRCUIT COURT OF APPEALS
1823 Stout Street
Denver, CO 80257

JOHN S. RENDALL	)	
	)	JOHN S. RENDALL,
	)	*Pro Se* Motion FOR THE
Appellant,	)	EXHIBITS OF THE
	)	RECORD BE
v.	)	SUBMITTED BY THE
	)	SECURITIES AND
SECURITIES AND	)	EXCHANGE
EXCHANGE COMMISSION,	)	COMMISSION
	)	
Appellee.	)	Case No. 00-2399

John S. Rendall *pro se* pursuant to Fed. R. App. P. Rule 28(a) respectfully moves the Court for entry of an Order requiring the Exhibits of the Plaintiff (Securities and Exchange Commission) ("SEC") and Defendants be filed with the Court by the SEC who are in possession of this part of the record.

As grounds for this motion the appellant states as follows:

1. The court order filed January 30, 2001 with a letter to the U.S. District Court for the District of New Mexico which directed the "record" to be filed in this case, whether designated by the parties or not.

2. The District Court's findings of fact and conclusions of

law, together with the entire transcript of the trial, as part of the record have been filed.

3. The appeal brief is based entirely on this record, and so the Exhibits extensively referred to therein would be needed by the Court of Appeals to evaluate the facts and conclusions of law which are being appealed in their entirety on a specific particularized basis.

4. This would greatly simplify the Appeals Court referencing of the appeal brief as the record itself is used as per Fed. R. App. P. Rule 28(e).

   - Complaint ¶
   - Transcript p.
   - Findings of Fact ¶
   - Exhibit no.

5. The economy of time and expense by the provisions of this part (Exhibits) of the record would help the Court and this *pro se* appellant.

6. The proposed submission by the SEC of exhibits in their possession has been discussed with Mr. Edward C. Schweizter, counsel for the SEC on February 22, 2001, and upon receipt of the draft opposes the Order.

7. John S. Rendall repeatedly spoke to the New Mexico District Court inquiring as to the Exhibits and was informed on February 22, 2001 that a motion needed to be filed to request the SEC for submission of the Exhibits of the Record.

Therefore the appellant John S. Rendall *pro se* requests that this Court enter and order as follows:

"The SEC shall submit to the Court the Exhibits of the Record together with the Appellee's brief."

Dated 23 February, 2001

/s/ John S. Rendall
John S. Rendall *pro se*
4301 Altura NE
Albuquerque, NM 87110

EXHIBIT B4

IN THE UNITED STATES
TENTH CIRCUIT COURT OF APPEALS
1823 Stout Street
Denver, CO 80257

JOHN S. RENDALL	)	
	)	JOHN S. RENDALL,
	)	*Pro Se* AMENDED
Appellant,	)	MOTION FOR THE
	)	EXHIBITS OF THE
	)	RECORD BE
v.	)	SUBMITTED BY THE
	)	SECURITIES AND
SECURITIES AND	)	EXCHANGE
EXCHANGE COMMISSION,	)	COMMISSION
	)	
Appellee.	)	Case No. 00-2399

John S. Rendall *pro se* pursuant to Fed. R. App. P. Rule 28(a) respectfully moves the Court for entry of an Order requiring the Exhibits of the Plaintiff (Securities and Exchange Commission) ("SEC") and Defendants to be filed with the Court by the SEC, who are currently in possession of this part of the record.

As grounds for this motion the appellant states as follows:

1. The court order, filed January 30, 2001, with a letter to the U.S. District Court for the District of New Mexico, directed the "record" to be filed in this case, whether designated by the parties or not.

2. John S. Rendall *pro se* now finds that the Exhibits were

returned to Solv-Ex Corporation attorneys and the SEC and that it would not be "easy" to recover them verifying their integrity.

- The issue has been discussed with Mr. Edward C. Schweitzer, Counsel for the SEC, on February 26, 2001, and Defendant Exhibits 885, 886, 887, Plaintiff Exhibits 20, 25 are now agreed and provided for attachment in the addendum.
- A copy of video Exhibit 1103 is also provided in the addendum.

Therefore the appellant John S. Rendall *pro se* requests that this Order enter and order as follows:

"The SEC shall submit to the Court the Exhibits of the Record together with the Appellee's brief, dated February 23, 2001, be placed with this amended motion and the Defendant Exhibits 885, 886, 887, 1103, and Plaintiffs 20 and 25 be part of the addendum to the *pro se* Appellant John S. Rendall opening brief."

Dated 28 February, 2001

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Telephone and Fax:
(505) 883-2955

EXHIBIT B 5

CASE NO. 00-2339

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES AND EXCHANGE
COMMISSION,

PLAINTIFF - APPELLEES,

v.

SOLV-EX CORPORATION,
JOHN S. RENDALL, and
HERBERT M. CAMPBELL,

DEFENDANTS - APPELLANTS.

Petition for a Panel Rehearing With Suggestion for a Hearing en banc of the Order and Judgment of Henry, Porfilio and Murphy, Circuit Judges, dated April 15, 2004

APPELLANT'S BRIEF

FILED BY JOHN S. RENDALL, DEFENDANT - APPELLANT

John S. Rendall, Pro Se
4301 Altura NE
Albuquerque, NM 87110
Phone (505) 883-2955

I. STATEMENT OF THE ISSUE

Fed. R. App. Proc 35, 40

A. Did the district judge for the United Sates District Court of New Mexico, the Honorable Bruce B. Black, deliberately fabricate evidence in response to the order of the panel dated August 4, 2003, which deceived the panel into entering its Order and Judgment dated April 15, 2004, denying in full Rendall's appeal of February 28, 2001?

Does this bias and prejudice of the trial judge demonstrated in the "fabrication of evidence" in the District Court's Amended Findings of Fact and Conclusions of Law dated September 24, 2003, disqualify this trial judge from any further opinion in the case under 28 U.S.C. § 144? The whole Amended Findings of Fact and Conclusions of Law are "tainted" and Rendall respectfully requests an order reversing the injunction and $5000 fine, due to egregious error.

The construction given to the term "bias or prejudice" by the United States Supreme Court in United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S.Ct 1698, 16 L.Ed.2d 778 (1966), where, in construing a federal judicial disqualification Statute, 28 U.S.C. § 144, the Court held:

> "The alleged bias and prejudice to be disqualifying must stem from an extra judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. (Citation omitted.)

Rendall's right to a "fair trial" is guaranteed by the Fifth Amendment of the US Constitution, which has been shown to be violated by the trial judge in deliberately fabricating evidence (non existent video testimony of Dr. J.

Fox) to support his Amended Findings of Fact and Conclusions of Law.

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II. FABRICATED EVIDENCE

The Court's amended Findings of Fact and Conclusions of Law dated September 24, 2003, as requested by the Appeals Court, was to address specific issues of evidence which relate originally to the testimony of Dr. J. Fox in the trial court. In the amended findings, the specific evidence Judge Black states came from Dr. J. Fox "video testimony", which is non-existent. (No such evidence is in the record). Paragraphs 31, 34, 44, 48, 50.

The Panel's Order of August 4, 2003 (Exhibit B-OA), to which Judge Black responded to on September 23, 2003 (Exhibit D-AFC).

The basis of the August 4, 2003 id at page 8:

"Where the trial court provides only conclusory findings, unsupported by subsidiary findings or by an explication of the court's reasoning with respect to the relevant facts, a reviewing court simply is unable to determine whether or not those facts are clearly erroneous." Roberts v. Metro. Life Ins. Co., 808 F. 2d 1387. 1390-91 (10th Cir. 1987) (quotation omitted) Here, although the district court made lengthy findings of fact. there are some important gaps that preclude effective appellate review of most of the issues raised on appeal. Therefore, we must make a limited remand to the district court for further factual findings and explications of its reasoning, as we explain below.

III. THE CORE ISSUE TO BE ADDRESSED BY JUDGE BRUCE B. BLACK AS PER ORDER DATED AUGUST 4, 2003

Solv-Ex's core technology was bitumen extraction (Id. Page 4). (Exhibit B).

For instance, with regard to defendants' representations that commercial-scale production of bitumen had begun at the Alberta plant on March 29, the district court made the following subsidiary findings: 1) during the March 29 run of the log washer circuit, installation of the automatic instrumentation had not been competed; 2) Solv-Ex personnel determined that modifications in the water circulation and clarification circuit would be necessary to achieve continuous operation; 3) the log washer had to be

shut down after only twelve hours due to an unexpected build-up of solids in the pump box; 4) Solv-Ex was not able to filter bitumen successfully at the Lease 5 plant until April 21, 1997, at which time it produced only two 55-gallon drums; 5) Solv-Ex was not able to duplicate the production of filtered bitumen thereafter; 6) after only two or three cycles of operation, the log washer circuit again developed operational problems on April 21 and had to be shut down; 7) in fact, after the log washer was shut down initially on March 29, it was not operated thereafter except for isolated test and demonstration runs of no more than six hours; and 8) Solv-Ex was never able to sustain continuous operation of the log washer at the Alberta plant.

If we compare these subsidiary findings to the defendants' relevant public statements of March 31, April 7, and April 30, we can determine which facts were omitted from those public statements. But we cannot determine which of the omitted facts the district court found to be material. Materiality is a "fact-specific inquiry" that "depends on the significance the reasonable investor would place on the withheld or misrepresented information." Basic Inc. v. Levinson, 485 U.S. 224, 240 (1988). Findings as to materiality are for the district court to make in the first instance.

IV. THE PANELS STATEMENT OF THE CASE AND THE ISSUE
(Order dated August 4, 2003)

The Securities and Exchange Commission (SEC) brought this enforcement action against defendants Solv-Ex Corporation, its CEO John Rendall, and its senior vice president and general counsel Herb Campbell, for alleged violations of § 7 (a) of the Securities Act of 1933 (Securities Act), § 10 (b) and § 13(a) of the Securities and Exchange

Act of 1934 (Exchange Act), and the rules promulgated under those Acts. The SEC contended that, from January 1995 through April 1997, defendants issued a series of public statements in press releases, letters to shareholders, conference calls with investors and brokers, and filings with the SEC, that created the misleading impression that each of the three technologies being developed by Solv-Ex was an unqualified success. The SEC asserted that "[t]he pattern of these statements created in the mind of any reasonable investor the expectation that commercial exploitation of the technologies, each with an attendant substantial revenue stream, was not only assured, but would occur in the very near future." R. Vol. IV, Doc 90 at 1.

After an eight-day trial to the bench, the district court issued a lengthy written decision finding that defendants Rendall and Campbell had made material misrepresentations and/or omissions in public statements and in filings with the SEC. The court imposed first tier civil penalties of $5,000 against each of the and permanently enjoined both men from future violations of § 17 (a), § 10(b), and § 13 (a). Now proceeding *pro se,* Rendall and Campbell each appeal. Because the district court's decision does not contain key factual findings that are essential to effective appellate review, we must make a limited remand to the district to supplement its factual findings.

V. JUDGE BRUCE B. BLACK'S RESPONSE TO THE ORDER OF THE PANEL DATED AUGUST 4, 2003

The fabricated evidence for the core findings on bitumen production, taken from the response dated September 24, 2003. Jerry Fox's Video deposition (No record. See Exhibit A).

Paragraph 31:

When it was clear the 44-inch production scale filter could not be designed and constructed in time to meet the widely publicized production schedule, Mr. Rendall directed Solv-Ex personnel to order a prototype 24-inch diameter Mott filter in November 1996. **Fox video testimony.**

Paragraph 34:

During the December 3, 1996 conference call, Mr. Rendall also stated that "we have a $13 million contingency to keep to our original oil production schedule." He further stated, "...please remember that the successful operation of our plant in the first quarter is planned to bring in a revenue stream of $1 million per month, rising to $4 million by the third quarter." Also during the December 3, 1996 conference call, Mr. Rendall stated "...we plan to establish continuous operation of three log washers, two of which will be installed in December of this year." Exs. 831, pp.1, 2, 3; 30. This was materially false and misleading as the internal Solv-Ex objective as of December 1996, as communicated by Mr. Rendall to company personnel, was only to install on of the log washer trains and demonstrate that it could be operated to produce bitumen in some amount or separate some amount of bitumen from sand by the end of March 1997. Moreover, two weeks later in mid-December 1996, portions of only one log washer train were on site. Ex. 30; **Fox video testimony.**

Paragraph 44:

During the March 29, 1997 test, settling and build-up of solids occurred in the pump box, a component of the log washer train, in an amount significantly greater than anticipated. Ex. 111, App. F. Due to the build-up of fine particle solids, the filters were "blinded" and the log washer

had to be shut down after just 12 hours of operation. Ex. 111, App. F. **Fox video testimony.** Messrs. Campbell and Rendall were both aware the filtration problem had forced the shutdown. Recognizing this would make all prior bitumen production predictions completely impossible, Mr. Campbell told Mr. Rendall the NASDAQ and others were expecting production by the end of March, so they better issue a statement. After numerous conversations over the weekend with Mr. Rendall, Mr. Campbell drafted a press release at 6:00 a.m. on March 31, 1997 and faxed it to NASDAQ. Solv-Ex announced that "bitumen production had commenced" at its Lease 5 oil plant. Ex. 35A. This was a material misstatement clearly designed to mislead investors.

Paragraph 48:

Following several unsuccessful attempts during early April 1997, Solv-Ex personnel first obtained a measurable amount of filtered Solv-Ex bitumen at the Lease 5 plant using the 24-inch prototype Mott filter on April 21, 1997. Exs. 108, 110, 111; **Fox video testimony**.

Paragraph 50:

The first successful filtration occurred on April 21, 1997, and the amount of filtered bitumen Solv-Ex produced through the use of the 24-inch prototype Mott filter was only two 55-gallon drums. Moreover, the production could not be duplicated. Ex. 110; **Fox video testimony.**

VI. THE ARGUMENT

The Fifth Amendment of the U.S. Constitution guarantees Rendall a right to a "fair trial". It is a "stringent rule" and will bar trial when the appearance of justice is not satisfied as well as (in) instances of actual bias. In re

Murchison, 349 U.S. 133, 136, 75 S. Ct 623, 625, 99 L. Ed 942 (1955).

In this instance, we have the actual bias of the trial judge in formulating Findings of Fact 31, 34, 44, 48, and 50 to support Conclusions of Law, when challenged to provide "basic evidence", as shown in deliberate fabrication of non-existent video testimony of Dr. J. Fox in his (Judge Bruce B. Black) Amended Findings of Fact and Conclusions of Law. The affidavit showing actual bias under 28 U.S.C. § 144 is timely and sufficient to show that "appearance of justice" is not satisfied in the ruling of the Appeals Court panel in accepting the trial judges assessment of the credibility of Rendall, and his actual statements. This issue was dealt with in Re International Business Machines Corp. 618 F. 2d 923, 929 (1980) Second Circuit.

> "As Mr. Justice Frankfurter noted in Wilkerson v. Mc Carthy, 336 U.S. 53, 65, 69 S. Ct. 413, 419, 93 L.Ed. 407 (1949) (Frankfurter. J., concurring), "A timid judge, like a biased judge, is intrinsically a lawless judge."

Rendall is not "clairvoyant" and did not understand Judge Black's rulings as based on "bias and prejudice" until the Appeals Court pressed the trial judge to provide "basic evidence". Bias and prejudice in the Amended Findings of Fact and Conclusions of Law, which were tainted by non-existent evidence in the video testimony of Dr. J. Fox, were raised by Rendall and now reasserted under the Fifth Amendment guarantee of a fair trial.

The panel's concerns regarding lack of specificity regarding "what was false or misleading about defendants statements" and "what material facts" should have been included to make the statements not misleading, OA12, were

not addressed in the District Courts reply AFC.[1]

Rendall specifically drew the panel's attention to the question raised on the "core issue" of bitumen extraction, OA 12, 13, in his supplementary Brief on paragraphs 31, 34, 44, 48, 50; RBr. 9, 10, 12, 13, 14, 15, pointing out that the evidentiary basis given by Judge Black was the non-existent video testimony of Dr. J. Fox- It was deliberately fabricated evidence. In his Reply Brief, Rendall reasserted that every finding is tainted in this fabrication of evidence (material error) RBr. 9, 10. In light of these facts of fabrication of evidence "the panel was deceived into accepting the biased District Judge's rulings, OJ 4,5. The panel did not address the issue of "fabricated evidence" tainting the findings, nor the lack of specific response by the District Court to their August 4, 2003 order OA.

The issue of materiality, credibility, and scienter are "fact-specific inquiries," OA 14 (materiality), OA 15 (scienter), and no mention of credibility in the record directly or indirectly. All the fact specific inquiries are not supported by the record and are tainted by the deliberately fabricated evidence" of a non-existent video testimony of Dr. J. Fox. Judge Black has demonstrated bias and prejudice in his opinion as based on evidence not in the record (non-existent

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[1] Order of Appeals Court dated August 4, 2003 is shown as OA - Exhibit B.

Order and Judgment of Appeals Court dated April 15, 2004 is shown as OJ - Exhibit C.

Amended Findings of Fact and Conclusions of Law of the District Court dated September 24, 2003 is shown as AFC - Exhibit D.

Rendall's Supplementary Brief is shown as Rbr - Exhibit E.

Rendall's Reply Brief is shown as RRBr - Exhibit F

video testimony of Dr. J. Fox) and is disqualified by 28 U.S.C. § 144 from this case. The US Supreme Court rulings of "bias and prejudice" as per 28 U.S.C § 144 in United States v. Grinnel Corp, 384 U.S. 563, 583, 86 S.Ct 1698, 16 L.Ed. 2d 778 (1966) control this case.

> "The alleged bias and prejudice to be disqualifying must stem from an extra judicial source and result in an opinion on the merits on some basis other that what the judge learned from his participation in the case. (Citation omitted.)"

The result of the judges disqualification is such that in fairness and in protection of Rendall's Constitutional rights to due process and equity, the order of the District Court enjoining Rendall from future violations of the Securities laws and imposing a $5000 penalty must be set aside.

VII. CONCLUSION

The Court of Appeals panel with suggestion for *en banc* is respectfully requested to reverse the lower courts order entered against Rendall on May 16, 2000 for the good and sufficient reasons as required by 28 U.S.C. § 144

Respectfuliy submitted,

/S/ John S. Rendall
John S. Rendall, Pro Se
2121 Menaul Blvd. NE
Albuquerque, NM 87107
Phone (505) 883-2955
Fax (505) 883-0391

EXHIBIT ___

AFFIDAVIT OF JOHN S. RENDALL AS PER U.S.C. § 144 FOR DISQUALIFICATION OF FEDERAL JUDGE BRUCE B. BLACK FOR BIAS AND PREJUDICE IN APPEALS COURT CASE NO. 00-2339

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

John S. Rendall, first duly sworn upon oath, deposes and states:

1. I am a Defendant/Appellant in the Docket Civil Action 98-860 BB/RLP on appeal from the United States District Court for the District of New Mexico in the United States Court of Appeals for the Tenth Circuit, Case No. 00-2339.

2. Attached as Exhibit A to this Affidavit is a true and correct copy of the entire list of exhibits in the trial of 98-860 BB/RLP.

3. To my personal knowledge, witness Dr. J. Fox testified in the case CV 98-860 BB/RLP and no video testimony was referred to in the transcript or in the record of exhibits.

4. Attached as Exhibit B to this Affidavit is a true and correct copy of the Court of Appeals Order dated August 4, 2003 in Case 00-2339, for Judge Bruce B. Black to provide specific primary evidence for his Findings of Fact and Conclusions of Law dated March 31, 2000 in CV 98-860 BB/RLP (page 8).

5. Attached as Exhibit C to this Affidavit is a true and correct copy of Judge Bruce B. Black's Amended Findings of Fact and Conclusions of Law dated September 24, 2003, wherein the basis of the primary evidence in paragraphs 31, 34, 44, 48 and 50 was the non-existent video testimony of Dr. J. Fox in DV 98-860 BB/RLP.

6. Attached as Exhibit D to this Affidavit is a true and correct copy of Defendant/Appellant John S. Rendall's Supplemental Brief dated October 20, 2004 challenging the findings of (4) in paragraphs 31, 34, 44, 48 and 50 as based on the non-existent video testimony of Dr. J. Fox. Pages 9-13.

7. Attached as Exhibit E to this Affidavit is a true and correct copy of Defendant/Appellant John S. Rendall's Reply Brief dated November 21, 2003, in which the Securities and Exchange Commission's Brief dated November 10,2003, acknowledgement of Dr. J. Fox's non-existent video testimony was asserted to show un-rebutted that the Amended Findings of Fact and Conclusions of Law of Judge Black (Item 4) in its entirety was tainted to Rendall's prejudice. Pages 9 and 10 by deliberately fabricated evidence. (Dr. J. Fox video testimony).

8. Attached as Exhibit F to this Affidavit is a true and correct copy of the Order and Judgment of the Panel of the Appeals Court, Henry, Porfilio and Murphy, Circuit Judges, filed April 15, 2004, wherein no reference is made to the non-existent video testimony of Dr. J. Fox or of Rendall's claim that the Findings of Fact and Conclusions of Law (Item 4) in its entirety was tainted

Further Affiant sayeth not.

/s/ John S. Rendall
John S. Rendall

Subscribed and sworn to before me this /s/ 27th day of May, 2004 by John S. Rendall.

/s/ Barbara A. Madrid
Notary Public

My commission expires:
Sept. 10, 2006
(notary seal affixed)